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MAX RHEINSTEIN

In Memory of Ernst Rabel

On SEPTEMBER 7TH, 1955, ERNST RABEL died in Zurich, Switzerland, in the 82nd year of his life. He was European by birth, tradition, and personality. He was in his sixty-sixth year when he came to the United States in 1939. He died as an American citizen. In the sixteen years of his life in this country, he enriched American legal science by his work as well as by his personal influence.

The wide scope of Rabel's work is reflected in the amplitude of his life experience. He was born on January 28th, 1874, in Vienna, then the spirited capital of a great empire. His father, Albert Rabel, was a leading member of the Austrian bar. Legal training at the University of Rabel's home town was supplemented by study in Germany and France. After a few months' activity at the Vienna bar, Rabel went for graduate study to Leipzig, Germany, where, in 1902, he was admitted to junior membership in the Faculty of Law and, in 1904, appointed to a professorship of Roman Law and German Private Law. In 1906 he was called to Basel, Switzerland. In 1910, he returned to Germany, where he joined the faculty of law of Kiel, then in 1911 of Göttingen, in 1916 of Munich, and in 1926 of Berlin. In Germany, university law faculties had for many centuries functioned as a kind of appellate court. When that system had come to an end in the early 19th century, German law teachers lost contact with legal practice. In Switzerland, however, or at least in Basel, a tradition continued under which professors of law acted as members of the appellate court of the canton. Eagerly Rabel seized upon this rare opportunity to combine academic with judicial work. He continued it for many years. In Munich he was a judge of the appellate court from 1920 to 1925. From 1921 to 27 he was German judge in the German-Italian Mixed Arbitral

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MAX RHEINSTEIN is a Member of the Board of Editors.

Tribunal, a busy international court having jurisdiction of certain reparation claims against the German Reich and of controversies between private parties to prewar contracts interrupted in their implementation by the outbreak of the war. From 1925 to 1927 Rabel was German judge *ad hoc* for the so-called Chorzow Cases in the most exalted of all international tribunals, the Permanent Court of International Justice at The Hague.

Keen understanding of the needs of legal practice was characteristic of Rabel's work as scholar and teacher. In line with European tradition he regarded it as the task of the legal scholar not just to reproduce the opinions of the courts but to guide them through the creative discovery of new problems and the formulation of approaches for their solution. In contrast to the many secluded theoreticians who could be found among the European legal scholars of his generation, Rabel knew what problems were of practical importance for the bar and the bench, what practical interests were at stake, and what theories were germane to the modes of thought of the practitioners. This trait of Rabel's mind was particularly conspicuous in his work in the field of conflict of laws, which has so long been distorted by the fine-spun and impractical theories of academic doctrinaires. Indeed, Rabel's awareness of the needs of legal practice has been particularly marked in a respect in which critics have charged him with insensitiveness for the limits of practicability. He postulates that the rules and concepts of conflicts of law must be developed upon a broad basis of comparative observation of all the legal systems of the world. It has been one of his most acute observations that many of the difficulties which have arisen in this subject matter have been caused by the habit of the legal thinkers of each country to elaborate the rules and concepts of its conflicts law upon the basis of their own systems of municipal law. The rules and concepts of conflicts law must be so formulated, however, that they can be applied to the legal phenomena of all legal systems among which "conflicts" are to be adjusted. Attempts to overcome the difficulties in any other way cannot but result in new difficulties and overrefined theories. This approach of Rabel's has been said to be unworkable because no judge could be expected to know all legal systems. Of course, no country's judges can be expected to be at home in legal systems other than their own. But the task of developing, upon the basis of comparative law, a universally workable law of conflict of laws is not the judge's but the scholar's, and that the scholar be at home in comparative law would not seem to be an improper demand.

As a comparatist, Rabel had, of necessity, to apply the method which has come to be called in Germany that of the jurisprudence of interests

and in this country that of sociological jurisprudence. This method has often been stated to be opposed to that of conceptual jurisprudence. No such opposition existed in Rabel's thought. In his view law was to be treated as a body of rules and concepts arranged harmoniously and systematically. It was his aim to improve the "system," to refine its concepts, and to prevent their obfuscation.[1] For him the good lawyer was he who would master the concepts and handle them deftly and cleanly for the achievement of the ends of good policy. A policy would not be good policy, however, if it neglected to consider the experiences of two millenia which had come to be precipitated in the concepts of the Civil Law.

Only on rare occasions did Rabel articulate these methodological convictions of his. Indeed, he avoided participation in the methodological controversy by which German juristic thought was agitated. He simply handled the legal concepts in his own way both in his writing and his teaching.

To his students, Rabel was a challenging, but not an easy teacher. The most popular of his colleagues were those in whose lecture courses the students could obtain a well-structured survey of the leading principles of the field in question. Rabel believed that such a survey could be obtained from books and that the valuable class hours should be used for the discussion of problems which were difficult to grasp, or had escaped the attention of the writers, or were so new that they were not yet treated in the books. In his universal mind, the new problem, it is true, often turned out to be but a novel appearance of one of those problems which have eternally recurred and for whose solution history and comparative law could present examples either to imitate or to avoid. Rabel's special qualities as a teacher were put to best use in courses in which he presented not a total field of the law but some special problems of limited scope which he could treat incisively rather than extensively. He was also in his element in the problem case courses which are offered in the German universities for every major field of law. He graded the term papers personally, studding them with pithy marginal notes and orally presented to the class his own solutions as models of how a convincingly sound decision could be reached in the step by step process of logical legal reasoning.

Rabel's scholarly work has been extensive. The bibliography of his writings contained in the *Festchrift* dedicated to him on the occasion of his 80th birthday covers twenty pages. These writings range over Roman and Greek law of antiquity, papyrology, history and dogmatics of Aus-

[1] *Cf.*, "Ausbau oder Verwischung des Systems" (Refinement or Obfuscation of Systematics) 10 Rheinische Zeitschrift für Zivil- und Prozessrecht (1919) 89–121.

trian, Swiss, and German private law, conflict of laws, international law, and, above all, comparative law.

Already at the start of Rabel's career, in his book on the *Seller's Liability for Defects of Title*,[2] he combined investigation of Roman law with research in the history and dogmatics of Austrian, German, and French law. In the earlier part of his academic life, his quickly established reputation was to a considerable extent based on his work in Roman law and papyrology. In his extensive essay on "*Patterned Transactions*,"[3] the comparative method was used to trace the course of important legal transactions through all those laws of antiquity of which we have information as well as in later developments. In his *Elements of Roman Private Law*,[4] published in 1915, he gave the first comprehensive presentation of the classical law and its transformations as recently reconstructed through the discovery and analysis of the interpolated passages in the *Corpus Iuris* and the other still extant works of the post-classical period.[5] The book is written in Rabel's characteristic style of such extreme conciseness that the immensely vast material has been condensed into just one hundred and forty-one pages. The book has proved to be of such durable significance that a reprint had to be published in 1955, just a few weeks before the author's death.[6]

The years of Rabel's professorship in Basel were those in which the new Swiss Civil Code was being prepared and presented to the public. In a number of searching articles Rabel made significant contributions to the exploration of its method and purport for the benefit of the lawyers of Switzerland as well as of foreign observers anxious to learn from this most recent specimen of modern codification.[7]

In Germany too, to which Rabel returned in 1910, the implications of the new German Civil Code, promulgated in 1897, and taking effect in 1900, had not yet been fully explored. Naturally, Rabel applied his vast

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[2] Die Haftung des Verkäufers wegen Mangels im Recht. Geschichtliche Studien über den Haftungserfolg. Leipzig, 1902. XVI, 356 pp.

[3] "Nachgeformte Rechtsgeschäfte; mit Beiträgen zu der Lehre von der Injurezession und vom Pfandrecht," Zeitschrift der Savigny Stiftung für Rechtsgeschichte. Romanistische Abteilung, vols. 27 (1906) 290–335, and 28, (1907) 311–379.

[4] Grundzüge des römischen Privatrechts. 1 Holtzendorff und Kohler's Enzyklopädie der Rechtswissenschaft. 7th ed. (1915) 399–540.

[5] Together with Ernst Levy, Rabel edited the monumental Index of Interpolations (Index Interpolationum quae in Iustiniani Digestis inesse dicuntur). Weimar, 1929–1935.

[6] Grundzüge des römischen Privatrechts. 2nd ed. Basel, 1955. viii and 341 pp.

[7] Among these writings the following appear to be of lasting interest:

"Der sogenannte Vertrauensschaden im schweizerischen Rechte," 27 Zeitschrift für schweizerisches Recht (1908) 291–328;

"Streifgänge im Schweizerischen Zivilgesetzbuch," Rheinische Zeitschrift für Zivil- und Prozessrecht, vol. 2 (1910) 308–340, and 4 (1912) 135–195.

knowledge and experience to the task of developing the system of the Code, and quite particularly to those problems which arose in the country in consequence of the political and economic upheavals of World War I, the revolution of 1918, and the catastrophic inflation of the post war years.[8]

Already in his thesis on the *Seller's Liability for Defects of Title*, Rabel had used the comparative method and applied it, together with the historical, to the clarification of problems of contemporary law. In none of his investigations of ancient and modern law did Rabel stay within the confines of one single system. Consistently, he used insights won from the investigation of one system for the clarification of the problems of another.[9] Self-evident though the use of the comparative method was to

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[8] Among these articles the following are of special significance:

"Die Unmöglichkeit der Leistung," Festschrift für Bekker. (1907) 171–237;

"Über Unmöglichkeit der Leistung und heutige Praxis," 3 Rheinische Zeitschrift für Zivil- und Prozessrecht (1911) 467–490;

"Die reichsgerichtliche Rechtsprechung über den Preisumsturz. Ein Wort zur Verständigung," 26 Deutsche Juristen-Zeitung (1921) 323-327;

"Die privatrechtliche Stellung der unehelichen Kinder," 15 Leipziger Zeitschrift für Deutsches Recht (1921) 538–543;

"Umstellung der Beweislast, insbesondere der prima facie Beweis," 12 Rheinische Zeitschrift für Zivil- und Prozessrecht (1923) 428–442.

[9] Of Rabel's earlier writings of this category, the following may be mentioned:

Haftpflicht des Arztes. Leipzig, 1904, 87 pp..

"Origine de la règle Impossibilium nulla obligatio," Mélanges Gérardin (1907) 473–512.

"Die eigene Handlung des Schuldners und des Verkäufers (Fait du débiteur; fait personnel du vendeur)" 1 Rheinische Zeitschrift für Zivil- und Prozessrecht (1909) 187–226.

Die Verfügungsbeschränkungen des Verpfänders, besonders in den Papyri. Leipzig, 1906, 112 pp..

"Dike exoules und Verwandtes," Zeitschrift der Savigny Stiftung für Rechtsgeschichte. Romanistische Abteilung, vol. 36 (1915) 340–390, vol. 38 (1918) 296–316.

"Die Erbrechtstheorie Bonfantes," 50 Zeitschrift der Savigny Stiftung für Rechtsgeschichte. Romanistische Abteilung (1930) 295–332.

"Erbengemeinschaft und Gewährleistung. Rechtsvergleichende Bemerkungen zu den Gaiusfragmenten," Mnemosyna Pappoulia (Athens 1934) 187–212.

"Katagraphe," 54 Zeitschrift der Savigny Stiftung für Rechtsgeschichte. Romanistische Abteilung (1934) 189–232.

"Die Stellvertretung in den hellenistischen Rechten und in Rom." Istituto di Studi Romani. Atti del Congresso Internazionale di Diritto Romano. Vol. 1 (1934) 237–242.

"Zum Besitzverlust nach klassischer Lehre," Studi in Onore di Salvatore Riccobono (1936) 203–229.

"Zu den allgemeinen Bestimmungen gegenseitiger Verträge," Festschrift für Dolenc, Krek, Kušej and Škerlj (Ljubljana 1937) 703–742.

"Real Securities in Roman Law. Reflections on a recent study by the late Dean Wigmore," 1 Seminar (1943) 32–47.

"The Statute of Frauds and Comparative Legal History," 63 Law Quarterly Review (1947) 174–187.

"The nature of warranty of quality," 24 Tulane L. Rev. (1950) 273–287.

Rabel, it was anything but self-evident to his contemporaries, of whom few disposed of a knowledge as vast as his.[10]

What will probably prove to be Rabel's most enduring contribution has been the conception of a workable scheme to overcome the limits of any single scholar's range of knowledge. In the natural sciences, it had long been accepted that their successful advancement required the pooling of individual talents and their co-ordination in team work. In legal science, the idea that it could, or had to be, carried on in organized institutes, had not yet been engendered. By conceiving and implementing this idea, Rabel made possible the transformation of German legal science from a state of ethnocentric isolation into that of world-mindedness, in which the resources of the experiences of all countries were made available for the development of German law, as well as for the training of German lawyers in the practical handling of legal matters of international scope. The example thus given has been followed by other countries, recently even the United States, in which, during the last sixteen years of his life, Rabel worked indefatigably for the promotion of interest in international legal studies (as comparative law, under the impact of the Ford Foundation, has now come to be called).

It was due to Rabel's insight, enthusiasm, and administrative skill that the first Institute of Comparative Law was established in 1917 at the University of Munich. It was no small achievement in the middle of World War I to persuade the Bavarian government and private sponsors to provide the necessary funds, however modest they were. Within a short time, the seminar which was regularly held at the Institute developed into the center of activity of the graduate students of the University; the library became an indispensable source of information for the Bavarian bar and bench; the director of the Institute and his assistant soon found it difficult to cope with the constantly growing number of inquiries which were directed to the Institute. What was begun on a modest scale in Munich soon had to be continued upon a much larger one in Berlin, where, in response to the pressing needs of Germany's growing involvement in international trade and politics, two large comparative law institutes were established in 1926 under the auspices of the Kaiser Wilhelm Foundation for the Advancement of Science. One was to concern itself with foreign and international public law, the other with foreign and international private law. There was no question but that Ernst Rabel should be director of the latter institute and simultaneously appointed professor of Roman and modern private law in the University of

[10] *Cf.* Rabel, "Institutes for comparative law," 47 Col. L. Rev. (1947) 227–237; see also Rheinstein, "Comparative law and conflict of laws in Germany," 2 U. of Chi. L. Rev. (1935) 252.

Berlin. The new institutes were to perform both theoretical and practical tasks. They were to carry on fundamental research, to report currently on legal developments in the leading countries, to give advice in matters of legislation, and to render information to the government, the courts, the bar, and to German business firms engaged in international trade. In keeping with the magnitude of their tasks, the institutes were provided with a large library and a sizeable staff. In 1932, the last year of the Weimar Republic, the Institutes had a combined library of some 200,000 volumes, containing, among others, the only collection of American materials to be found outside of the United States comparable in size to that of a major American law school library. The combined staff consisted of some forty members, not counting library, clerical, and technical help. Each staff member was trained to be a specialist in the law of at least one foreign country.[11]

For the dissemination of the results of the Institute's current observation of foreign development there was established a new journal, which, officially called *Journal of Foreign and International Private Law*,[12] has come to be commonly cited as Rabel's *Journal*.[13] As the director of the Private Law Institute, Rabel saw to it that basic research was not sacrificed to the tasks of applied research. The journal was conducted so that it was basically a learned periodical, and for the publication of major studies of the Institute, Rabel established a special series of monographs.[14] Among the topics to which major studies were devoted in the Institute were the basic structure of the law of contracts and torts in the French legal system and in the Common Law,[15] the modern trends in the law of

[11] Rabel's program for the cultivation of comparative law was proclaimed in his lecture on "Aufgabe und Notwendigkeit der Rechtsvergleichung," published in 14 Rheinische Zeitschrift für Zivil- und Prozessrecht (1926) 279–301.

[12] Zeitschrift für ausländisches und internationales Privatrecht, 1927 *et seq.* Rabel edited the journal from 1927 to 1936.

[13] Rabel's Zeitschrift.

[14] Beiträge zum ausländischen und internationalen Privatrecht, 1928 *et seq.* Rabel was the editor of the first 12 volumes.

[15] John Wolff, Die Haftung des Verkäufers einer fremden beweglichen Sache in den Vereinigten Staaten von Amerika in Vergleichung mit dem deutschen bürgerlichen Recht. Beiträge Nr. 2. 1930.

Wolfgang Friedmann, Die Bereicherungshaftung im anglo-amerikanischen Rechtskreis in Vergleichung mit dem deutschen bürgerlichen Recht. Beiträge Nr. 3, 1930.

Max Rheinstein, Die Struktur des vertraglichen Schuldverhältnisses im anglo-amerikanischen Recht. Beiträge Nr. 5, 1932.

Friedrich Kessler, Die Fahrlässigkeit im nordamerikanischen Deliktsrecht unter vergleichender Berücksichtigung des englischen und des deutschen Rechts. Beiträge Nr. 6, 1932.

Karl Arndt. Zessionsrecht. I. Teil. Rechtsvergleichung. Beiträge Nr. 7, 1932.

Felix Eckstein, Das englische Konkursrecht. Beiträge Nr. 12, 1935.

Eduard Wahl, Vertragsansprüche Dritter im französischen Recht unter Vergleichung mit dem deutschen Recht dargestellt an Hand der Fälle der action directe. Beiträge Nr. 9, 1935.

business corporations,[16] the difficulties encountered in the international enforcement of claims for family support,[17] commercial arbitration in international matters,[18] conflict of laws,[19] and above all, the law of sale of goods. The latter study was undertaken upon the request of the League of Nations' Institute for the Unification of Private Law in Rome, upon whose Board of Directors Germany was represented by Ernst Rabel. The last-named study resulted in the publication of Rabel's own treatise on the *Law of Sale of Goods*, a monumental work in which the laws of the world are comparatively analyzed and critically surveyed toward the end of laying the foundation for a uniform sale of goods act of potentially world-wide application.[20] Both the completion of Rabel's treatise and the practical work on the international uniform sales act were interrupted by the upheavals of 1933 and 1939. Rabel was able to resume his part of the work some time after the termination of World War II[21] and complete the manuscript of the second volume of his treatise just shortly before his death. The work of preparing an international convention for the unification of the law of sales was taken over after the War by the Government of the Netherlands, by which it was placed upon the agenda of the Sixth Hague Conference of Private International Law.[22] At what time, if any, the international situation will permit the completion of the work, is unforeseeable. The successive drafts of an internationally uniform sales act have already attracted, however, the attention of those working on

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[16] Walter Hallstein, Die Aktienrechte der Gegenwart. 1931.

Clemens Schlink, Die Ultra-vires-Lehre im englischen Privatrecht. Beiträge Nr. 10, 1935.

[17] Opinion prepared for the League of Nations' Institute for the Unification of Private Law (1932). The opinion has constituted the basis for the efforts, resumed after World War II, to prepare an international draft treaty on the enforcement of claims for family support.

[18] Walter Pappenheim and Max Rheinstein, Die Vollstreckung deutscher Schiedssprüche im Ausland. 1932.

[19] Ludwig Raiser, Die Wirkungen der Wechselerklärungen im internationalen Privatrecht. Beiträge Nr. 4, 1931.

Konrad Duden, Der Rechtserwerb vom Nichtberechtigten an beweglichen Sachen und Inhaberpapieren im deutschen internationalen Privatrecht. Beiträge Nr. 8, 1934.

Wilhelm Wengler, Beiträge zum Problem der internationalen Doppelbesteuerung. Die Begriffsbildung im internationalen Steuerrecht. Beiträge Nr. 11, 1935.

Conflicts law is also treated in numerous articles written by members of the staff of the Institute and published in the Zeitschrift für ausländisches und internationales Privatrecht.

[20] Das Recht des Warenkaufs. Eine rechtsvergleichende Darstellung von Ernst Rabel unter Mitwirkung der früheren und jetzigen wissenschaftlichen Mitarbeiter des Instituts. Vol. 1, 1936.

[21] *Cf.* Rabel, "A draft of an international law of sales," 5 U. of Chi. L. Rev. (1938) 543–565.

"International sales law," Lectures on the Conflict of Laws and International Contracts, delivered at the Summer Institute of University of Michigan, 1951.

[22] "The Hague Conference on the Unification of Sales Law," 1 Am. J. Comp. L. 58–69 (1952).

recent national legislation, among them the new Uniform Commercial Code of the American Law Institute, whose chief draftsman, Karl Llewellyn, at one time participated in the discussions of the Rome group.[23]

Through its activities and achievements, Rabel's Institute has exercised a considerable influence on legal practice and theory. Even more far-reaching has been the influence which it has exercised indirectly as a training center in international legal studies. Rabel was careful in the selection of his staff, exacting in his demands, and inspiring in his leadership. To have been a member of his staff came to be a mark of distinction and a favorite recommendation for candidates for that most exalted of all branches of the legal profession of Germany, i.e. the teaching branch. In rapidly rising numbers, chairs of private law were filled with former members of the staff of Rabel's Institute. They carried into the law schools their master's enthusiasm for comparative law, for a juristic method which would combine knowledge of, and regard for, the needs of practical life with the craftsman's skill in the use of the law's conceptual tools, and his deep sense of responsibility for the tasks of the law teacher and scholar.

The large number of important positions presently occupied by former members of Rabel's staff is indicative of his ability to choose and train his helpers. Among them are a cabinet minister and a secretary of state in the government of the Federal Republic of Germany, the president of the German Science Research Foundation, at least fourteen full professors in universities of Western Germany and the United States, two honorary professors, a presiding justice of a German appellate court, and a number of lawyers recognized as leaders in international practice. The scope of Rabel's influence is extended further through those numerous law teachers in Greece, Italy, France, the United States, and other countries, who have been his students at one time or another.

It is, of course, not possible exactly to determine the share which Rabel has had in transforming the modes of German legal thought from the pattern of nationally isolated self-sufficiency to receptive and co-operative world-mindedness, especially since the development was interrupted by Hitler's rise to power and the Second World War. It can be said, however, without exaggeration that Rabel's conviction of the "necessity of cultivating law comparatively"[24] and of the need of special institutes devoted to this task has born rich fruits.

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[23] *Cf.* Rabel, "The sales law in the proposed Commercial Code," 17 U. of Chi. L. Rev. (1950) 427–440.

[24] See *supra*, n. 11.

In the course of World War II, the Institute which Rabel had founded was evacuated from Berlin to Tübingen, and its library suffered severe losses. After the War, the Institute was reorganized under the energetic directorship of Professor Hans Dölle. Under its new name of Max Planck Institute of Foreign and Private International Law, it is ready to move from its constrained emergency quarters in Tübingen to a spacious new building in Hamburg, the city which has traditionally been Germany's window toward the world. Already before the National-Socialist revolution the majority of German law faculties had begun to follow the example which Rabel had established in Munich, and to create special institutes of comparative law. Most of these have survived the war, and new ones have been added as local centers of research and instruction in international legal studies. Institutes of the kind have also been established in most other countries of continental Western Europe. In England, the new Institute of Advanced Legal Studies at the University of London regards comparative law as an essential part of its program. In the United States alone, no major research institute of the kind has yet been established; legal research, even where it is concerned with the role of legal institutions in society, is still carried on as if nothing could be gained from foreign phenomena and experiences. Instruction in international legal studies has found generous support through the Ford Foundation, which has not yet provided the funds, however, which are necessary for research. In the physical sciences or medicine it would, of course be regarded as absurd, if research were to be limited to phenomena observable within the United States, or if teaching programs were to be developed without facilities for research.

The years in which Rabel was the celebrated professor at the University of Berlin, the director of the Kaiser Wilhelm Institute, and Germany's representative in the World Court and other international legal bodies, constituted the external climax of Ernst Rabel's career. They were followed by an abrupt reversal. Since he was of "Non-Aryan" extraction, Rabel was removed from his offices by the National-Socialist regime. For some time he believed that he might be spared the worst, but after initial leniency he too was cut off from the possibility not only of publishing any book or article but even of entering the Institute and using the library which he had founded. There followed the other humiliations and spoliations to which Non-Aryans were subjected in the Third Reich. Shortly before communications were cut off by the outbreak of World War II, Rabel at long last took the often considered and always postponed step of emigrating to the United States.

When the first refugees from Germany arrived in this country in 1933,

they were received with magnificent friendliness and generosity. The professional men and scholars among them were accepted into American professional and university life with a readiness and openmindedness to which history knows no parallel. But even the greatest willingness to help could not qualify a man who had had his training exclusively in the law of Germany for the American legal profession. Unless he started to study law all over again, he was of little use in the United States. The only ones who were in a different position were those who had been members of the staff of Rabel's Institute. They had been trained to look beyond the narrow compass of the law of Germany, and some among them had gone through a process of training in the Common Law. For those who were to leave Germany, it was not difficult to find their niche in the legal life of the United States.

Paradoxically, it proved to be more difficult to find a stable position for Rabel himself. When he arrived in this country, he had reached the age at which an American professor has to retire. Only through the imaginativeness of William Draper Lewis, director of the American Law Institute, was it possible to find a task worthy of a scholar like Rabel. The Restatement of the American Law of Conflict of Laws had recently been concluded. Lewis took up a suggestion which had been made to him by the late Professor Mendelssohn-Bartholdy, viz. that the Restatement be supplemented by a companion volume in which the conflicts laws of the major foreign systems were to be presented in the order of arrangement of the Restatement. Hardly could a man be so uniquely well-qualified as Rabel to undertake the task. He accepted it eagerly, but the implementation of the plan turned out to be perplexing. It was not easy to raise the modest funds required, and it soon became apparent that the order of arrangement of the Restatement was not suitable for the presentation of the foreign laws. In 1942, the University of Michigan Law School came to rescue. It assumed responsibility for the continuation of the work, which Rabel was now to carry on as an independent enterprise and not as an annotation to the Restatement.

In Ann Arbor, Rabel had the use of the Law School's magnificent library, the help of research assistants, and above all the advice of Professor Yntema, who with never-flagging patience carried on the extensive job of editing the successive parts of Rabel's manuscript. Thus, Rabel was enabled to write there the major part of his *magnum opus*, "Conflict of Laws: A Comparative Study."[25]

The last three years of Rabel's life were filled with much wandering

[25] The work constitutes a part of the Michigan Legal Studies. Volume 1 was published in 1945, volume 2 in 1946, volume 3 in 1950. The fourth volume is being readied for publication.

between the continents in search of a place in which he might again become truly settled. Some part of these years was spent at the library of the Harvard Law School, where he had access to the unique facilities in Langdell Hall and completed the manuscript of the fourth volume of his Conflict of Laws. For a time he lived in Tübingen, Germany, to which his old Institute had moved after the outbreak of the War. Some months were spent at the Free University of Berlin, which appointed Rabel to an honorary professorship on its faculty. During all this time, Rabel was indefatigably at work. The last months of his life were spent in painful illness in Germany and Switzerland, where he died just after the completion of the manuscript of the second volume of his *Comparative Law of Sales*.

In all adversity, Rabel's spirit and creativity remained unbroken. Indefatigably, in full intellectual vigor, and with ever-maturing wisdom, he carried on his work. It will stand as a monument to a man of unique learning, vision, creativity, and self-discipline.

ARTHUR VON MEHREN

The Judicial Process: A Comparative Analysis

ANSWERS ARE SOUGHT IN THIS PAPER for two questions that arise when we compare the judicial process in France, Germany, and the United States. What are, in the first place, the theories of judicial decision current in each system? And what implications do these theories have for the judicial process; in particular, for judicial lawmaking? Secondly, what elements other than current theories of judicial decision influence the judicial process in these three systems, operating to define for each system the area, degree, and type of judicial lawmaking?

Our comparative analysis is in terms of the way historical and institutional facts define the circumstances under which courts will reach a solution other than that flowing most easily from a system's generally accepted doctrinal premises. Such an investigation suggests the general tendencies of the judicial process' approach in each of these systems to the decision of concrete cases. Light could, of course, also be thrown on these matters by considering various fields of substantive law. This is not practical here because the operation of the judicial process in many fields would have to be compared, carefully and in detail, and because such a study would not permit us to compare the general tendencies of each system unless allowance were made, which is very difficult to do, for differences in social, political, and economic conditions, and in their rate of change.[1]

ARTHUR VON MEHREN is a Member of the Board of Editors. This paper is a condensed and somewhat altered version of the concluding chapter in his book, The Civil Law System: Cases and Materials for the Comparative Study of Law, to be published this fall by Prentice-Hall. On the subject matter of this article see also: "The Judicial Process in the United States and in France—A Comparative Study," 22 Revista Jurídica de la Universidad de Puerto Rico (1952–1953) 235 (published in an Italian translation as "Il Procedimento dell' Attività Decisoria Negli Stati Uniti e in Francia," 4 Jus (1953) 71 and in a revised version in Spanish as "Estudio comparativo de la función judicial en Francia y en los Estados Unidos," 2 Revista del Instituto de Derecho Comparado (1954) 61) and "The Judicial Process in the United States and Germany—A Comparative Analysis," in 1 Festschrift für Ernst Rabel (1954) 67.

[1] Detailed investigations of such areas of French and German law as the French courts' handling of industrial and automobile accidents, the development of the *astreinte* (indirect specific performance) in French law, and the revalorization of contracts by the German courts in the inflationary period after World War I would appear to yield results consistent with the analysis made here. See the forthcoming book, von Mehren, The Civil Law System: Cases and Materials for the Comparative Study of Law.

Nor do we present our own theory as to when the courts in each of these systems should engage in judicial lawmaking. Though much of our discussion is relevant for a consideration of this problem, our concern is with an assessment of what judges in these systems are in fact likely to do. Each system's official position on this question is considered in the first part of our discussion—but we do not evaluate or criticize a system's attitude, treating it rather as one objective element in the complex of forces shaping judicial behavior.

In drawing comparisons, it must be remembered that each system functions as a whole. Its general tendencies depend on the interaction in concrete situations of all the elements discussed. Nor can the systems be compared by assigning equal weight to each element considered. A particular element may influence the operations of the judicial process more strongly in one system than in another. Only after analyzing for each system the full range of historical, institutional, and social fact here considered, can comparative generalizations be offered with respect to the judicial process in France, Germany, and the United States.[2]

I. THEORIES OF JUDICIAL DECISION

A society professing a theory of judicial decision by which the true nature of the judicial process is obscured, encourages a mechanical execution of the judicial function. When the legal profession including the judges are trained to think in mechanical and doctrinal rather than functional and substantive terms, mental habits are developed that stand in the way of the perception requisite to a truly functional approach. The orthodox statements of the theory of judicial decision in France, Germany, and the United States have historically contained, and perhaps still contain today, elements of a mechanical theory of the judicial process.

In the United States, an authoritative starting point for legal reasoning is today ordinarily found either in previously decided cases or in statutory law. Orthodox theory grounds the initial interpretation of a statutory provision on the historical intention of the legislator.[3] This is to be gathered from a consideration of the language of the statute and of legis-

[2] Our analysis is specifically directed to the private law. A consideration of these problems in the general area of public law, or in criminal law, would raise questions that are not investigated. However, the general scheme of analysis would seem valid for these areas.

[3] For discussions of the handling of statutory interpretation by American courts see the various articles in A Symposium on Statutory Construction, 3 Vanderbilt L. Rev. (1950) 365–596; see also Cox, "Judge Learned Hand and the Interpretation of Statutes," 60 Harv. L. Rev. (1947) 370; Frankfurter, "Some Reflections on the Reading of Statutes," 47 Col. L. Rev. (1947) 527.

lative history. Once a statutory provision has been judicially interpreted or, in the absence of an applicable statute, a problem has been judicially resolved, the orthodox theory of judicial decision is usually stated in terms of the principle of *stare decisis*. The holding of a decision of a superior court must, if in point, be followed by a subordinate court,[4] holdings of other courts are persuasive in varying degrees, and a court will ordinarily follow, though it may under exceptional circumstances overrule,[5] a holding contained in one of its own previous decisions.[6] Intimately connected with the principle of *stare decisis* is the form of the traditional common law decision presenting the result reached as a logical deduction from authoritative starting points for reasoning contained in the holdings of decided cases.[7]

Thus formulated, the orthodox American theory of judicial decision suggests that the process of deciding a given case is essentially doctrinal

[4] See note 85 *infra*.

[5] It is usually said that *stare decisis* operates more rigidly where a statutory interpretation is involved than where the court is dealing with pure case law. Mr. Justice Jackson put the proposition in United States v. South Buffalo Railway Co., 333 U.S. 771, at 774–75 (1948), as follows: ". . . when the questions are of statutory construction, not of constitutional import, Congress can rectify our [the Supreme Court's] mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made. . . ." Dean Levi writes that ". . . courts are less free in applying a statute than in dealing with case law. . . ." "An Introduction to Legal Reasoning," 15 U. of Chi. L. Rev. (1948) 501, at 505. Levi justifies the stricter policy of *stare decisis* where statutes are involved on the ground that only in this way can responsibility for statutory change be centered on the legislature. See *id.* 523.

This strict rule of *stare decisis* in the statutory field is not universally accepted. As Mr. Justice Rutledge wrote in his concurring opinion in Cleveland v. United States, 329 U.S. 14, 20, at 22–23 (1946), ". . . there are many reasons, other than to indicate approval of what the courts have done, why Congress may fail to take affirmative action to repudiate their misconstruction of its duly adopted laws. Among them may be the sheer pressure of other and more important business. [Citation omitted.] At times political considerations may work to forbid taking corrective action. And in such cases, as well as others, there may be a strong and proper tendency to trust to the courts to correct their own errors . . . as they ought to do when experience has confirmed or demonstrated the errors' existence."

[6] See, for discussions of the principle of *stare decisis* as practiced in the United States, Mr. Justice Brandeis dissenting in Burnet, Commissioner of Internal Revenue v. Coronado Oil & Gas Co., 285 U.S. 393, 405 (1932); Douglas, "Stare Decisis," 49 Col. L. Rev. (1949) 735; Chamberlain, The Doctrine of Stare Decisis (1885). It should be noted that the English principle of *stare decisis* is more restrictive than the American principle: both the House of Lords and the Court of Appeal are, in theory, absolutely bound by their own decisions. See Goodhart, "Precedents in the Court of Appeal," 9 Camb. L. J. (1947) 349; Wright, "Precedents," 8 Camb. L. J. (1943) 118. For a recent criticism of the English principle, which raises the question of the extent to which it actually makes the law more certain, see Cooper, "Defects in the British Judicial Machine," 2 Jour. of Soc. of Public Teachers of Law (n.s.) (1953) 91, at 95–96.

[7] See, for an interesting discussion, Llewellyn, "Die Deutsche Justiz vom Standpunkt eines amerikanischen Juristen," 61 Juristische Wochenschrift (1932) 556.

and semi-automatic. However, the theory, when further investigated, is seen to point in a variety of ways to the process's non-mechanical nature. It thus contains its own corrective. For example, the attention orthodox theory devotes to the distinguishing of cases, the number of different holdings that can form the basis for decision, the variety of recognized analytical procedures by which the reach of these holdings can be contracted or expanded,[8] the frank recognition that there may not be any decision or statute in point and, finally, the court's right under certain circumstances to overrule a precedent, these all suggest that the process of decision is necessarily more than a purely doctrinal or quasi-mechanical procedure.

The considerations decisive for an American court when it comes to consider whether to overrule one of its previous decisions reveal with particular clarity the role that perceptive and informed judgment must play in the judicial process. Before overruling a precedent an American court considers the degree to which the decision in question is still grounded in reason and principle, the magnitude of the issue involved in the decision, the propriety of judicial correction, including the effect upon legal security of a departure from the previously accepted precedent,[9] and the likelihood of legislative correction of the precedent.[10] Thus, in dealing with constitutions, American courts have tended to adopt flexible canons, recognizing that constitutional documents evolve with the evolution of society and that, in view of the relatively great difficulty of obtaining constitutional amendments, this evolution must to a large extent find expression through the judicial process.[11]

[8] See Stone, The Province and Function of Law (1946) 166–91; Maine, Ancient Law (13th ed. 1890) 31–33.

"... There are usually plenty of precedents to go around; and with the accumulation of decisions, it is no great problem for the lawyer to find legal authority for most propositions. The difficulty is to estimate what effect a slightly different shade of facts will have and to predict the speed of the current in a changing stream of law. The predictions and prophecies that lawyers make are indeed appraisals of a host of imponderables. The decisions of yesterday or of the last century are only starting points."

Douglas, *loc. cit. supra* note 6, 736; see also Kessler, "Contracts of Adhesion—Some Thoughts about Freedom of Contract," 43 Col. L. Rev. (1943) 629, at 638.

[9] See pp. 225 *infra*.

[10] See pp. 219 *infra*.

[11] Chief Justice Marshall early said "... we must never forget, that it is *a constitution* we are expounding." M'Culloch v. State of Maryland, 4 Wheat. 316, at 407 (U.S. 1819). "...[I]n cases involving the Federal Constitution where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions." Mr. Justice Brandeis, dissenting in Burnet v. Coronado Oil & Gas Co., *loc. cit. supra* note 6, 406–07. See also Douglas, Stare Decisis, *loc. cit. supra* note 6, 736–37; A. N. Hand, "Mr. Justice Frankfurter," 62 Harv. L. Rev. (1949) 353, at 355.

In France and Germany, an authoritative starting point for legal reasoning is ordinarily[12] to be found in one of the various codes or in the general body of statutory law. The orthodox French theory of judicial decision is today perhaps somewhat more restrictive than orthodox German theory. French theory considers the judge bound by the provisions of the written law.[13] It refuses any binding effect to previous judicial interpretations, even one emanating from a hierarchically superior court.[14] This theory is reflected in the traditional form of the French decision[15] which begins with a recital of the applicable code provisions, does not discuss or analyze previous decisions, and sets forth the court's holding as deductively derived from the cited provisions, usually without indi-

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[12] Such is not the case in every field of private law. For example, in both French and German law very few legislatively given starting points for legal reasoning are available in the field of private international law.

[13] Although modern theories of interpretation have urged the courts to go beyond the written law (see note 17 *infra*), ". . .[i]t is unquestionable that for the judge in the existing state of our system there is not, properly speaking, any source of positive law other than statute." From an address delivered on the centenary of the French Civil Code by Ballot Beaupré, Le Centenaire du Code Civil (1904) 23, at 26. See also 1 Ripert and Boulanger, Traité Élémentaire de Droit Civil de Planiol (5th ed. 1950) §151, pp. 66–67 (". . .[T]he courts do not willingly give up the support of the texts. . . ."). The Court of cassation, which can in theory only consider questions of law, has declined to accept a violation of case law as a ground for cassation. See Préfet de l'Aube v. Payard, Cass. req., 21 December 1891, D. 1892. I. 543.

[14] See note 87 and p. 221 *infra*. Decisions, especially a series of successive decisions reaching similar results, have as a practical matter considerable influence upon the future judicial handling of comparable situations.

". . . Certainly, in theory, this is not a binding rule of law because, with us, in contrast to the case law or English law of cases, other courts, and even those which made the decisions that established the jurisprudence (case law), retain full freedom to decide in a different way in similar cases that they will be called upon to decide in the future. But, in fact, these reversals hardly ever take place and the precedents, if they do not *bind* our judges, inevitably *inspire* them."

1 Colin and Capitant, Cours Élémentaire de Droit Civil Français (11th ed. by Julliot de la Morandière, 1947) §36, p. 40. *Cf.* Vedel, "De l'arrêt Septfords à l'arrêt Barinstein," J.C.P. 1948. I. 682, §13. The statement to the court of Paul Matter, Procureur Général, in Jand'heur v. Les Galeries belfortaises (Cass., ch. réunies, 13 February 1930, D. 1930. I. 57, at 65) is also interesting in this connection: ". . . The *chambres réunies* [united chambers of the Cour de cassation] is not at all, so far as I know, a court given to great changes, it follows—this is the greatest of our traditions,—the totality of the general movement, recognizing and accepting the advances and thus completing the whole case law." It is also interesting to note the suggestion that the conciseness of French decisions, especially those of the Cour de cassation, is due in part to a desire on the part of the judges not to bind themselves unduly for the future. See Appert, Note to Nourrigat v. Pech, Cass. civ., 28 February 1910, S. 1911. I. 329.

[15] See, for a good discussion of the form of French decisions, Lawson, Negligence in the Civil Law (1950) 233–34.

cating such doubts as the court may have had to overcome in reaching this result.

Upon closer examination, however, orthodox French theory suggests, as does American theory, the non-mechanical nature of the judicial process. It recognizes that the written law is neither complete nor unambiguous.[16] French courts, in interpreting and applying legislatively given rules and principles, are enjoined to consider not only the language of the act but also the social end that rendered the statute necessary.[17] Finally, though several analytical procedures, each of which yields a different result, are recognized as potentially available to the court in interpreting a provision of the written law, orthodox theory does not furnish a principle of logic to determine which procedure is to be utilized in a given case.[18]

The orthodox German theory of judicial decision today recognizes clearly, and rather more explicitly than does French theory, the non-mechanical nature of the judicial process.[19] The court can ordinarily find an authoritative, legislatively given starting point for its reasoning.

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[16] Article 4 of the French Civil Code provides that "An action for denial of justice can be brought against a judge who refuses to give judgment in a case on the ground that the written law (*loi*) is silent, obscure or incomplete." See also Article 185 of the Penal Code. It is interesting to note that the Commission revising the French Civil Code proposes to omit Article 4 as unnecessary. See [1950–1951] Travaux de la Commission de Réforme du Code Civil (1952) 11.

[17] See Bonnecase, "The Problem of Legal Interpretation in France," 12 Journal of Comparative Legislation and International Law (3rd ser. 1930) Part I, 79, at 91. Still broader theories of interpretation have been advanced.

"... [W]hen the text presents some ambiguity, when doubts arise as to its meaning and scope, when it can to a certain extent be contradicted or contracted or when on the contrary expanded through comparison with another text, I believe that the judge has the broadest powers of interpretation. He does not need to confine himself to an obstinate inquiry into the meaning that, in framing such and such an article, the framers of the Code had actually intended a hundred years ago. He must ask himself what would have been their intent if the same article had been framed by them today. He must say to himself that in the light of all changes that have occurred in the course of a century in ideas, ethical standards, and institutions, in view of the economic and social conditions now prevailing in France, justice and reason direct him to adapt the statutory text, liberally and with humanity, to the realities and needs of modern life. . . ."

Ballot Beaupré, *loc. cit. supra* note 13, at 27.

[18] For example, there is no principle of logic by which a choice can be made between reasoning by analogy and by *argumentum a contrario*. *Cf.* 1 Ripert and Boulanger, *loc. cit. supra* note 13, §159, p. 70; Oertmann, "Interests and Concepts in Legal Science," in The Jurisprudence of Interests (trans. and ed. by Schoch, 1948) 51, 69–72.

[19] See Weinkauff, "Die Aufgaben des Bundesgerichtshofs," 3 Neue Juristische Wochenschrift (1950) 816, at 816; see also G. and D. Reinicke, "Die Auslegungsgrundsätze des Bundesgerichtshofes," 4 Neue Juristiche Wochenschrift (1951) 681 (discussion of first year's work of the Bundesgerichtshof in terms of the extent to which that court handled cases in terms of an evaluation of conflicting interests).

It is, however, clearly perceived that the codified law is neither complete[20] nor unambiguous.[21] Furthermore, the courts are stated to have in certain situations the right to deviate from legislatively given rules.[22] The orthodox German theory of judicial decision, like its American counterpart, thus explicitly reveals the non-mechanical nature of the judicial process.

The procedures German courts are to use in analyzing a given text also emphasize the non-mechanical nature of the judicial process. "A one-sided preference for grammatical considerations and for the words of a text lead to literal interpretations and formalism, the deadly enemy of true legal science. . . ."[23] The true sense and purpose of the provision are to be sought.[24] Here weight is to be given not only to the words and system of the code, and to the text's legislative history, but also to the practical results flowing from various interpretations.[25] The court can go so far as to interpret the text in terms of the intent the legislator would, hypothetically, have if he were legislating at the present time with knowledge of contemporary conditions.[26] However, German decisions are usually not written to reflect clearly the non-mechanical nature of the judicial process. Such analysis of previous decisions as they contain is ordinarily rather formal. Like French decisions, they customarily present the result as a logical deduction from authoritative starting points for reasoning contained in the codified law. The doubts that were overcome in reaching the result, when discussed, are rarely emphasized.

These systems' orthodox theories of judicial decision did not always indicate as explicitly as they now do the non-mechanical nature of the judicial process. A certain inherited inclination may still remain in each system for more mechanical conceptions. In civil and common law systems, a doctrinal, abstract and deductive method came to dominate legal discussion and analysis in the last half of the nineteenth century. The writings of such men as Langdell in the United States, Aubry and Rau

[20] See Enneccerus, Allgemeiner Teil des Bürgerlichen Rechts (14th ed. by Nipperdey, 1952) §51, p. 194, §58, pp. 207–12. The law is complete in the sense that the courts will decide every dispute. See *id.*, §42, p. 168; Bockelmann, "Geschäftsverteilung und gesetzlicher Richter," [1952] Juristenzeitung 641, at 644. There is no formal statement of this principle in German law analogous to Article 4 of the French Civil Code. See Enneccerus, *op. cit. supra*, §58, p. 207. Such a provision was contained in the first draft of the Civil Code. It was dropped as a self-evident proposition.

[21] See Enneccerus, *op. cit. supra* note 20, §51, p. 194, §§53–54, pp. 197–201.

[22] See *id.*, §59, pp. 213–17.

[23] *Id.*, §56, p. 206.

[24] See *id.*, §51, p. 195; *cf.* Preussischer Fiskus v. Graf B., Reichsgericht, Seventh Civil Senate, 7 November 1916, 89 ERG (Z) 187; M. v. A., Bundesgerichtshof, Second Civil Senate, 23 May 1951, 2 EBGH (Z) 176, at 184–85.

[25] See Enneccerus, *op. cit. supra* note 20, §57, p. 206. See also *id.* §51, p. 195.

[26] See 1 Staudinger, Kommentar zum Bürgerlichen Gesetzbuch (10th ed. 1936) 31.

in France, and Windscheid in Germany proceeded to a considerable extent on the premise that legal relations and concepts have an essential nature. From these legal entities, existing independently of the practical requirements of individual fact situations, all determinations in individual cases flowed through a process of deduction.

Of the three legal systems, the German most completely accepted a mechanical, doctrinal conception of law and of the judicial process. The German Civil Code, drafted during the final decades of the nineteenth century, was prepared in the period of greatest popularity of mechanical conceptions. Until the early years of the twentieth century, the orthodox German theory of judicial decision was quite different from that held today. The method of exegesis or *Begriffsjurisprudenz* considered all law the creation of the legislator's conscious will. The positive law of a given country and period was viewed as a self-sufficient whole, embodied in codes and taken to contain, in the form of logical principles inherent in its structure, its own method of development. The judge was merely to apply the legislatively given text or, where the text was obscure, to discover the legislator's intent. To discover this intent, legislative history and the doctrines accepted at the time the text was adopted were to be examined. If this research proved inconclusive, the judge found a solution by applying certain analytical processes to the written text.[27] Codes were, in short, to "... be enlarged out of [themselves], out of the system of justice (*Rechtssystem*) [they] contain..."[28] The legal order was a *logische Geschlossenheit.*

During roughly the same period similar, though less pronounced, tendencies toward a mechanical conception of the judicial process are found in orthodox American and French theory.

"... [T]he strict [common-law] theory of the last century ... [conceived] the judicial function to begin and end in applying to an ascertained set of facts a rigidly defined legal formula definitively prescribed as such or exactly deduced from authoritatively prescribed premises. Happily, even in the height of the reign of that theory, we did not practice what we preached ...."[29]

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[27] These were: reasoning by analogy, reasoning *e contrario*, and, most important, reasoning by induction to find the general rule, and by deduction to apply the general rule to a particular case.

[28] 1 Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich (1888) 16. "The Civil Code intends to regulate the whole private law insofar as it is neither contained in Reich legislation nor reserved by the Introductory Law for legislation by the various states...." 1 Planck, Bürgerliches Gesetzbuch (1897) 34; *cf.* 2 Gény, Méthode d'Interprétation et Sources en Droit Privé Positif (2nd revised ed. 1932) 356.

[29] Pound, "The Theory of Judicial Decision III," 36 Harv. L. Rev. (1923) 940. "... According to ... [this] theory the law is conceived of as an entity, existing apart from and

The French Civil Code was drafted before the period of greatest popularity in Europe of mechanical conceptions of the judicial process. Its drafters never held the theory that the positive, legislatively-given law was a self-sufficient whole embodied in codes containing, in the form of logical principles inherent in their structure, their own method of development.[30] They recognized that

> "A code, however complete it may appear, is no sooner promulgated than a thousand unexpected questions are presented to the judge. The laws, once written, remain as they were written. Man, on the contrary, never remains the same, he changes constantly. This change, which never stops, produces at every instance some new combination, some new fact, some new result."[31]

At later periods, French thinking came closer to that of the drafters of the German Civil Code. However, a mechanical theory never completely dominated French thought on the nature of codified law.[32] And, as early as 1899, a powerful and extremely influential statement of a non-mechanical conception of the judicial process was made by Gény in his classic work, *Méthode d'Interprétation et Sources en Droit Privé Positif*.[33]

After 1900, opposition to mechanical theories of the judicial process and to the method of exegesis increased throughout Europe. For Germany, Zitelmann clearly demonstrated that the codified, legislatively-given law neither was, nor could be, a perfect, complete and self-contained system.[34] The proposition was everywhere advanced with increasing frequency that the written law must be considered a sociological phenomenon rather than the will of an historically given legislator. In France, Gény proposed the theory of "free scientific research": Judges are to be bound by the text of the written law only when, and to the extent that, the text is clear. In all other cases, they must, against the background of the legal system as a whole and of the values held by the society, consider the particular social and economic facts involved, trying to arrive at the most just solution for the given situation. The Swiss Civil Code

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antedating the decisions; i.e., there is a complete body of pre-existent law or system of rules ready for application to any and every situation that may arise. . . ." Carpenter, "Court Decisions and the Common Law," 17 Col. L. Rev. (1917) 593. See also Fuller, "American Legal Realism," 82 U. of Pa. Law Rev. (1934) 429, at 434–35.

[30] See Discours Préliminaire of Portalis, Tronchet, Bigot-Préameneu and Maleville in 1 Locré, La Législation de la France (1827) 251, at 255–58, 260, 264–65.

[31] *Ibid.* at 258.

[32] *Cf.* 1 Aubry and Rau, Cours de Droit Civil Français (3rd ed. 1856) §§38–40, pp. 115–23; Charmont and Chausse, "Les Interprètes du Code Civil" in 1 Le Code Civil (1904) 133.

[33] See Bonnecase, *loc. cit. supra* note 17, at 79. 90.

[34] In Lücken im Recht (1903).

(enacted 1907, effective 1912), in its much discussed Article 1, provided that judges should decide cases not covered by the text of the Code on the basis of customary law or, where no such rule exists, in accordance with the rules the judge, taking into account legal writing and court decisions bearing on the problem, would have established as a legislator. In Germany, *Interessenjurisprudenz* was one of several schools of thought[35] emphasizing the non-mechanical nature of the judicial process. In the United States, comparable ideas were put forward by writers on sociological jurisprudence, and by the realistic school.[36] The first half of the twentieth century thus saw functional conceptions of law and of the judicial process everywhere replace more mechanical and abstract approaches.

The attitude of the judiciary in a given system to judicial lawmaking is closely related to that system's theories of judicial decision. The more mechanical a system's conception of the judicial process, the more restricted its idea of the judicial function and of the propriety of judicial lawmaking. A judge in a system holding a more or less mechanical theory of judicial decision may well perceive that the theory does not conform to reality. Nevertheless, he cannot avoid the implication that the system conceives of judicial activity in restrictive terms. This element in his total intellectual environment thus encourages in him an attitude unfavorable to judicial lawmaking. Indeed, such is the intent, in the deepest sense, of those legal systems still today holding to more or less non-functional conceptions of the judicial process.

Today, in all of the legal systems under discussion, orthodox theories of judicial decision indicate clearly enough the functional, non-mechanical nature of the judicial process. However, the extent to which the insight embodied in these formulations affects the actual workings of the courts in each system depends to a considerable extent upon other matters.

II. ELEMENTS INFLUENCING THE PROCESS OF JUDICIAL DECISION

A. The Form and Content of Judicial Decisions

The theory of judicial decision prevailing in a legal system affects judicial practice not only through the general orientation it gives, but

[35] The Freie Rechtschule also emphasized the nonmechanical nature of the judicial process. It went very far in completely freeing the judge, in a large number of situations, from the written law.

[36] See Pound, "Fifty Years of Jurisprudence," 50 Harv. L. Rev. (1937) 557; Pound, "The Scope and Purpose of Sociological Jurisprudence," 24 Harv. L. Rev. (1911) 591; 25 *id.* (1911, 1912) 140, 489.

also through the type of analysis and investigation it requires the court to make in each case. The careful investigation of the facts and reasoning of a series of decided cases required of American courts, though it may encourage them to conceive of their function as mechanical matching of fact situations, on the whole probably directs the judge's attention to the pattern of interests pressing for recognition.[37] French and German courts can, although the orthodox theory of judicial decision suggests that they do more, limit their analysis to a consideration of relatively abstract code provisions.[38] These courts are not automatically exposed in the process of reaching a decision to a variety of fact situations more or less closely related to the matter before the court.

In each system, as might be expected, the actual content of the decision reflects differences in analysis and in the investigation undertaken in line with the implications that can be drawn from the system's orthodox theory of judicial decision. An American decision begins, as a rule, with an elaborate statement of the facts and includes a careful discussion of precedents. The name of the author of the opinion is given, as are the names of the other judges on the court where the case was decided by a collegiate bench. Dissents are recorded. Concurring and dissenting opinions are permitted and are relatively frequent.[39] When the decision is later before another court as a precedent it thus contains a record, at least in part, of the considerations that lay behind it and of the doubts some judges may have had as to the results reached.

The reader of a German or, even more decidedly, a French opinion finds less to remind him of the non-mechanical nature of the judicial process. The extreme is found in the decisions of the Cour de cassation. They are extremely brief and abstract. They begin with a reference to the applicable code provisions, followed by a short statement of facts, after which come conclusions of fact and law. No full analysis of either the facts or the law is given. Previous decisions are never analyzed in

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[37] "... The rules and principles of case-law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment.... The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined," Munroe Smith, Jurisprudence (1909) 21.

[38] It is interesting to note in this connection that the American Restatements, by offering ready-made formulae abstractly stated, may be encouraging a mechanical approach by the courts. "In reading the advance sheets, one has an uneasy feeling that the courts are gradually losing the habit of thinking through the implications of the cases before them. ..." Fuller, "Introduction," The Jurisprudence of Interests (trans. and ed. by Schoch, 1948) xxvii, at xx. Compare the mechanical application of what became §293 of the Restatement of Contracts in Southern Surety Co. v. MacMillan Co., 58 F. 2d 541, at 549 (10th Cir. 1932).

[39] See, for a discussion of the importance of the dissent in American practice, Douglas, "The Dissent: A Safeguard of Democracy," 32 Jour. Am. Jud. Soc. (1948) 104.

detail even in the rare cases in which their persuasive effect is explicitly recognized. Decisions of lower French courts are fuller, but never comparable to American decisions. The extremely abstract quality of the Cour de cassation decisions is considerably mitigated when the statement of the reporting judge and the brief presented by the representative of the Ministry of Justice (acting as an *amicus curiae* in the interest of society) are reported.[40] These are often printed together with decisions of importance. Moreover, the report of an important decision is usually accompanied by a decisional note which may do much to fill in background.[41] The handling of the facts and the law in German decisions is fuller than in French decisions but less extensive than that often given by American courts.

French and German opinions as reported are unsigned. Any differences of opinion within the court, whether as to the reasoning or the result, are not indicated.[42] Indeed, the informed reader knows that the opinion

[40] See, *e.g.*, Report of Conseiller Le Marc'hadour and Statement of Procureur Général Paul Matter in Jand'heur v. Les Galeries belfortaises, Cass., ch. réunies, 13 February 1930, D. 1930. I. 57, at 57–64, 64–70.

[41] ". . . Decisional notes have the considerable advantage of presenting the law (*droit*) as a living thing, that is to say, in all the complexity of opposing interests that the law must reconcile. . . ." Meynial, "Les Recueils d'Arrêts et les Arrêtistes" in 1 Le Code Civil (1904) 175, at 196.

[42] ". . . [I]n France, the judge takes an oath, when he is named, not to reveal the differences of opinion on the bench." Batiffol, "Contrastes entre l'esprit juridique anglosaxon et l'esprit juridique continental," 14 Annales de Droit et de Science Politique (1954) 3, at 7. Article 198 of the Gerichtsverfassungsgesetz imposes a similar duty of secrecy on the laymen who, in certain proceedings, deliberate with the judges on questions of fact and of law. A comparable provision applying to judges was contained in an early draft of the Gerichtsverfassungsgesetz. However, the judge's duty in this connection was considered so self-evident that the provision was later dropped as unnecessary. See Protokolle, 207, in Hahn, Die gesammten Materialien zu dem Gerichtsverfassungsgesetz (2nd ed. 1883). It is perfectly clear that the German judge is today under such a duty of silence. See Baumbach, Zivilprozessordnung, (23rd ed. by Lauterbach, 1954) comment 1 before art. 192 of Gerichtsverfassungsgesetz, p. 1702.

During the drafting of the Gerichtsverfassungsgesetz a proposal was made to give the judges in the minority the right to indicate in the published opinion the fact of, and the reason for, their dissent. The proposal was rejected on the grounds that:

"It was incompatible with the authority of the courts and good relations between the judges. . . . The proposal would lead to Byzantinism and to the seeking of publicity. It would foster vanity and disputatiousness. As few decisions would be unanimous, dissenting opinions would become the rule. The development of law and of legal science will be fostered by careful reflection in libraries, but not through violent discussions following expressions of polemically motivated dissenting opinions. The court faces the outside world as a single authority, whose decisions are the decision of the court. A court's principal function is to decide the individual case justly and to uphold the authority of the laws, not to provoke scientific discussions over legal questions."

Bericht der Kommission, 72, in Hahn, *op. cit. supra*, 984–85. A proposal to allow judges to record dissenting votes in a secret court record was accepted by the drafting commission

may even have been written by a judge who did not vote for the result reached.

B. The Reporting System

The system of reporting developed in each of these legal systems mirrors, and tends to support, the habits of thought about the judicial process encouraged by the form and content of the judicial decision. In the United States, a vast collection of human experience and judicial experimentation has been brought together and systematically ordered by reporting and digesting services.[43] All decisions of the more important jurisdictions, with some exceptions, are usually reported in full by both official and unofficial reporters.[44] Decisions dealing with a particular problem can be located with relative ease and their subsequent history as precedents rapidly determined.

The reporting systems found today in France[45] and Germany approach

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during the first reading of the Gerichtsverfassungsgesetz. See *id.* 361–65. This provision was struck from the law by the committee during the second reading. See *id.* 851. The Bundesgerichtshof now permits each dissenting judge to "set out his position and file same with the court's record." See Bekanntmachung der Geschäftsordnung des Bundesgerichtshofes §9 (March 3, 1952) in 4 Bundesanzeiger, no. 83.

There was some support for permitting the new German Constitutional Court to publish dissenting opinions on the ground that these could assist materially in the development of a body of constitutional law. See remarks of Laforet, 6 Verhandlungen des Deutschen Bundestages (I. Wahlperiode 1949) 4288. The proposal was rejected due to general agreement that

> "The trust in justice and especially in constitutional justice is not sufficiently developed with us to preclude the possibility in litigation with political aspects that public reactions, at once unpleasant and dangerous for the entire institution as such, may result if, in litigation involving political issues, a judge himself asserted that it would have been possible to decide otherwise."

Remarks of Wahl, in *id.* 4224–25. It is interesting to note that in one case the fact that two judges dissented has been indicated. See Decision of 12 December 1952, reprinted in 2 Der Kampf um den Wehrbeitrag (II/2 Veröffentlichung des Instituts für Staatslehre und Politik, Mainz, 1953) 812. This decision held that the individual senates of the court would be bound by an advisory opinion to be given by the full court in connection with the question of the constitutionality of the European Army treaty. Judge Geiger filed a written dissent in the case. See *id.* 822. These departures from accepted practice have been explained on the ground that this was an advisory opinion. See Schätzel, "Prozessuale Fragen des Bundesverfassungsgerichts," 78 Archiv des Öffentlichen Rechts (1952) 228, at 236.

[43] See, for a survey of the reporting and citation system developed in the United States, Morgan, Introduction to the Study of Law (2nd ed. by Morgan and Dwyer, 1948) 192–201, 250–52, 255–56, 270–72, 274–75, 277–78, 279–82; Price and Bitner, Effective Legal Research (1953) 103–33, 383–420.

[44] There is no official reporter, though official slip sheet opinions are available, for the United States Courts of Appeal or the United States District Courts. Their decisions are published in the Federal Reporter (full coverage) and in the Federal Supplement (selected opinions only).

[45] See, for an interesting survey of the history of case reporting in France, Meynial, *loc.*

the body of decided cases less as a collection of human experience and judicial experimentation than as judicial applications of the written law. There is no fully developed system of official reports.[46] The unofficial reports are selective. Often only parts of decisions are published.[47] Nor is the case material thus made available systematically organized with a view to making a survey of the various judicial attempts to deal with a particular practical problem. A degree of systematization is achieved by decisional notes, annotated codes, and commentaries. This systematization is, however, more doctrinal and less oriented to practical situations and problems than that provided in the United States by, for example, the West Reporter System.

C. Legal Education[48]

The degree to which legal education in each system emphasizes the importance in the decision-taking process of policy and factual considerations is important. Legal education in the United States, conducted by the case method,[49] tends to emphasize such considerations. In so doing, it directs attention, at a very formative stage in the lawyer's career, to the non-mechanical nature of the judicial process. This emphasis is especially, and necessarily, great at the so-called national law schools which do not train their students for practice in a particular jurisdiction. With instruction designed to be relevant for some forty-nine different bodies of substantive law, the common law taught could hardly be rigidly dogmatic.[50]

Legal education in France and Germany, on the other hand, gives relatively less attention to the importance of policy and factual considerations in the decision-taking process.[51] This is due in part to the

cit. supra note 41. Meynial points out the relationship between a well-developed reporter system and non-mechanical judicial activity. The incompleteness of the reporting of cases, especially in certain fields, has been criticized. See Marty, "Rôle du juge dans l'interprétation des contrats," in 5 Travaux de l'Association Henri Capitant (1950) 84, at 88.

[46] In France, there is an official reporter for the Cour de cassation. In Germany, there are selective, semiofficial reporters for the higher courts.

[47] A recent publishing venture will now, for the first time in German legal history, give the general public access, by consulting the semi-official reporter and the new unofficial reporter, to all decisions of the highest regular German civil court, the Bundesgerichtshof. See Danckelmann, Book Review, 4 Neue Juristische Wochenschrift (1951) 702.

[48] See, for a general comparison between legal education in Europe and in the United States, Schweinburg, Law Training in Continental Europe (1945); Riesenfeld, "A Comparison of Continental and American Legal Education," 36 Mich. L. Rev. (1937) 31; see also Tunc, "New Developments in Legal Education in France," 4 Am. Jour. of Comp. Law (1955) 419.

[49] See Redlich, The Common Law and the Case Method in American Law Schools (1914).

[50] *Cf.* Llewellyn, Book Review, 50 Col. L. Rev. (1940) 944, at 948–49.

[51] See Allemès, "The System of Legal Education in France," [1929] Journal of Society of Public Teachers of Law, 36–39.

importance of the lecture method in continental legal education. Lectures incline toward an exposition of general principles from which the results in concrete cases are derived by a process of deductive reasoning. The lecture method gives less opportunity for, and incentive to, a full exploration of the factual background of individual decisions.

D. The Judge's Position in Society

Several important and deep-seated differences in the social position of continental and American judges are self-evident.[52] Some limitations on the role of the American judge are implicit in the wide-spread use of the jury and in the adversary tradition of common law procedure. However, these do not bulk large in the total picture. The common law is a monument to the judicial activity of the common law judge. They, not the legislator or the scholar, created the common law. They still enjoy the prestige of that accomplishment. Historically, the operations of the judicial process in the common law world have, on the whole, given satisfaction. The American bench has traditionally attracted successful and forceful personalities from the practicing profession.[53] It comprises a relatively small and select group. The American judge is not a member of a bureaucratic institution. He often serves out his judicial career on one court. Society has given all its judges a large measure of economic security and social prestige. American courts played an important part in the struggle for independence from England. Today they perform, with the general approval of society, an important political function through judicial review of the constitutionality of legislative and executive action.[54]

The picture in France and Germany is rather different. For a variety of reasons, especially the absence of a centralized administration of justice, the courts of these two countries never had an opportunity to develop a common or general law appropriate for the emerging national

[52] Judges in all three systems are constitutionally protected against legislative and executive interference. For United States federal judges, see U.S. Constitution, Art. III, sec. 1; for French judges, see French Constitution (1946) Art. 84; Morel, Traité Élémentaire de Procédure Civile (2nd ed. 1949) §§137–42, pp. 133–38; for German judges, see Basic Law, Art. 97.

[53] Practicing lawyers were appointed to the bench in England as early as the fourteenth century. See Plucknett, "The Place of the Legal Profession in the History of English Law," 48 Law Q. Rev. (1932) 328, at 333.

[54] There has been certain amount of criticism of judicial review. See, *e.g.*, Cushman, The Role of the Supreme Court in a Democratic Nation (1938); Cohen, "Is Judicial Review Necessary?" (an address delivered on April 24, 1936) in Basic Issues in American Democracy (ed. by Bishop and Hendel, 1948) 181; Haines, "Judicial Review of Acts of Congress and the Need for Constitutional Reform," 45 Yale L. Jour. (1936) 816; Meigs, "Some Recent Attacks on the American Doctrine of Judicial Power," 40 Am. L. Rev. (1906) 641.

economic and political units.[55] In France codification, with its beginnings as early as the seventeenth century, became inevitable as the effective economic, political, and social units expanded from the localized feudalism of the Middle Ages to the nation-state of the nineteenth century.[56] The great codifications of the early nineteenth century decisively shifted the point of growth in French law from the courts to the legislator. Preceding and paralleling this reliance upon the legislative process was an increasing popular dissatisfaction with the courts and the judicial process.[57] Court procedures were slow. Judges came from the dominant social classes of the *ancien régime* which, discredited and inflexible, was eventually overthrown by the French Revolution. In the struggle for non-revolutionary reform during the period immediately preceding the Revolution, the courts were on the side of the old order.[58] Particularly resented were the obstructionist tactics of the French courts known as "Parlements" both in refusing to give effect to reform legislation and in issuing general orders (*arrêts de règlement*) on such matters as customary law, police regulations, and procedure.

Against this background, it is not surprising that in the early part of the nineteenth century French society revealed, especially through legislation,[59] a deep-seated distrust of the judicial process and a desire to hold

[55] See Munroe Smith, "State Statute and Common Law," in A General View of European Legal History (1927) 52, at 93–104. An excellent, brief sketch of the struggle for legal unity in Germany is given in Simons, "Das Reichsgericht" in Die Höchsten Gerichte der Welt (ed. Magnus, 1929) 3–7; see also Deák and Rheinstein, "The Development of French and German Law," 24 Georgetown L. Jour. (1936) 551, at 568–71; Ancel, "Case Law in France," 16 Journal of Comparative Legislation, (3rd series. 1934) Part I, 1, at 3.

[56] That the legislature had to intervene in order to unify and simplify French law is seen in Portalis' description of the situation in France on the eve of the promulgation of the French Civil Code: "What a spectacle opened before our eyes! Facing us was only a confused and shapeless mass of foreign and French laws, of general and particular customs, of abrogated and non-abrogated ordinances, of contradictory regulations and conflicting decisions; one encountered nothing but a mysterious labyrinth, and, at every moment, the guiding thread escaped us. We were always on the point of getting lost in an immense chaos." 1 Fenet, Recueil Complet des Travaux Préparatoires du Code Civil (1836) xciii.

[57] See, *e.g.*, Title II of a Law of 16–24 August 1790, "Of the Judges in General," which is an excellent statement of the basic principles of reform for the Revolutionary period. The most important of these can be summarized as follows: judicial offices were no longer to be sold; justice was to be rendered without charge; judges were to be elected for a period of six years; all citizens were to appear before, and be judged by, the same courts. Article 12 provided that "They [the courts] shall have no power to make any general rules (*réglements*); but shall appeal to the legislature whenever they deem it necessary, whether to interpret a law or to make a new law."

[58] See Gaxotte, The French Revolution (trans. by Phillip, 1932) 67–74.

[59] The Constitution of 3 September 1791 provided, for example, in Title III, ch. 5, art. 22, that "Each year the Tribunal de cassation must appoint a committee of eight of its members to appear before the legislature and present an account of the judgments rendered, together with a summary of each case and of the text of the law which determined the decision." See also art. 257 of the Constitution of 5 Fructidor, An III (August 22, 1795).

it within narrow limits. An early revolutionary Law of 3 Brumaire, An II (1793), contemplated a procedure reduced to the barest essentials and suppressed the *avoués*, the class of lawyers traditionally charged with handling procedural matters. This act was soon repealed. French society continued, however, to assign strict limits to the judicial process—as is shown by Article 5 of the Civil Code, designed to prevent any revival of the *arrêts de règlement*, and the refusal of the drafters of the Constitution of 1946 to give the courts power to review the constitutionality of legislation.[60]

The position of the German courts was never challenged to the same extent. However they, like the French courts, have no claim to credit for developing a common law. German aspirations for legal unity were served first by the reception of Roman law, then by a unifying legal scholarship, the so-called *Pandekten-Schule*, and finally by the great codifications of the final decades of the nineteenth century. During this period, the German courts were never subject to attacks as heavy as those made in the revolutionary period against the French courts. It is also perhaps suggestive that there is no French equivalent to the German legend of the Miller of Sanssouci and Frederick the Great. However, during the first half of this century, respect for the German judiciary

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[60] The present-day French attitude towards this question was well expressed by Latournerie, *commissaire du gouvernment*, in his discussion of the problem before the Counseil d'État in connection with the Case of Arrighi, 6 November 1936, S. 1937. III. 37, at 34–36. His remarks on the public attitude toward the courts are particularly interesting:

"If . . ., in spite of the progress that he has made toward the extension of his powers, the judge, and in particular the administrative judge, has overcome the prejudice that viewed the judges of the intermediary period [1789–1804] with suspicion, it would be, it seems, a vain and dangerous undertaking for the judges to risk, through such a claim to power, all that had already been gained by the courts. Whatever setbacks certain overly rigid ideas as to the sovereignty of the written law have experienced, it is nonetheless true that, in the theory and also the practice of our public law, Parliament still expresses the general will and is dependent in this connection only on itself and on this same general will."

Id. at 36. See also Radin, "The Judicial Review of Statutes in Continental Europe," 41 W. Va. L. Q. (1935) 112; Laroque, "Les juges français et le contrôle de la loi," 33 Revue du Droit Public (1926) 722.

The problem of judicial review was considered in connection with the drafting of the new French Constitution of October 27, 1946. The proposal was made to entrust review of the constitutionality of decrees and ordinances to the Conseil d'État, and of laws to the Cour de cassation. See remarks of Bardoux in Séances de la Commission de la Constitution (1946) 101 and in 2 Annales de l'Assemblée Nationale Constituante, Débats (1947) 3764. This proposal received little support. The Constitutional Committee, established by Article 91 of the Constitution of 1946, is not a judicial body and has little real power. This Committee has, to the date of this writing, convened only once. See Prélot, Précis de Droit Constitutionnel (3rd ed. 1955) §447, p. 516. For a description of its deliberations see Soulier, "La Délibération du Comité Constitutionnel du 18 Juin 1948," 65 Revue de Droit Public (1949) 195. On one other occasion, the threat was made to convene the Committee. See Prélot, *op. cit. supra*, §448, p. 517.

probably decreased markedly in several periods.[61] In the twenties and later, there was some feeling that justice, especially criminal justice, had political overtones.[62] A second crisis occurred under the Nazis.[63] Recently, German society has indicated an increased faith in the judicial process and greater respect for the courts. Especially indicative in this connection are the provisions of the Bonn Basic Law establishing, for the first time in German legal history, a comprehensive system for judicial review of the constitutionality of legislative action.[64]

French and German judges enjoy some social prestige and, to the extent that inflation has not rendered it illusory, economic security.[65] In neither of these respects, however, are they in a position comparable to that of their American colleagues. Moreover, the French and German judiciaries remain in substance a special branch of the general bureaucracy.[66] Recruitment is ordinarily by examination. The judicial career is usually begun when relatively young. Only rarely have appointees proved themselves at the bar. Whatever a judge's qualities, he can expect ap-

[61] See generally Schiffer, Die Deutsche Justiz (1949) 9–28.

[62] See *id.* 12, 14.

[63] See *id.* 19–28.

[64] For a discussion of this development and of the new Bundesverfassungsgericht, see Leibholz, "The Federal Constitutional Court in Germany and the 'Southwest Case,'" 46 Am. Pol. Sci. Rev. (1952) 723; von Mehren, "Constitutionalism in Germany—The First Decision of the New Constitutional Court," 1 Amer. Jour. of Comp. Law (1952) 70.

[65] For France, see Bacon, "On a Ministry of Justice," 22 Va. L. Rev. (1935) 175, at 179–80; Tyndale, "The Organization and Administration of Justice in France," 13 Can. Bar. Rev. (1935) 567, at 576 ("French judges are extremely badly paid."); Perroud, "The Organization of the Courts and the Judicial Bench in France," 11 J. Comp. Leg. and Int. Law (3rd ser. 1929) Part I, pp. 1, at 17–18. Today a French judge does not earn as much as a good lawyer but is well paid for a civil servant.

The economic situation of the German judge appears to be unsatisfactory. See Weinkauff, "Grundsätzliches zu der Referenten-Denkschrift über das künftige Richtergesetz," 32 Deutsche Richterzeitung (1954) 227; Bockelmann, *loc. cit. supra* note 20, 641. This condition is not new. See Ensor, Courts & Judges in France, Germany, and England (1933) 56.

[66] Article 98 of the Basic Law requires that the legal status of judges be regulated by special laws. "The most important change [introduced by the Basic Law] is the removal of the judge from the general law covering officials (*Beamten*). . . . These provisions consciously depart from the earlier German practice which treated the judge as merely a special sort of official. . . ." Strauss, "Die rechtsprechende Gewalt im Bonner Grundgesetz," 4 Süddeutsche Juristen-Zeitung (1949) 523, at 531. See also Kommentar zum Bonner Grundgesetz, (1950) comment IIA to art. 98, pp. 119–26 (The official report on Article 98 (1) and (3) reads in part as follows: "An important change from the Weimar Constitution is the attempt to emphasize the special situation of the judge as the representative of the third branch of government, the judicial power. . . ." *Id.* pp. 119–20). In spite of these provisions, the German judge is still today characterized as a "Beamter." See Weinkauff, *loc. cit. supra* note 65, at 227.

It can be noted that German judges perform certain quasi-judicial tasks, for example, in connection with the commercial register and the land register. Much of the work done in the United States by referees and masters is handled by the German judge. This situation has been criticized. See *ibid.*

pointment to a higher court only after long years of service in lower courts.[67] Only rarely is a successful practitioner or a leading scholar called to the bench.[68] The French or German judge, though he has in some ways broad powers over the conduct of the litigation and usually sits without a jury, tends, except perhaps in the case of presiding judges, to be an anonymous figure, whose individuality is lost in a collegiate bench which does not permit the expression of concurring or dissenting opinions.[69]

It is, therefore, probably accurate to conclude that the position of German and French judges in their respective societies is still such as to instill in them a somewhat greater sense of limitation and to offer fewer encouragements to creative and original work than are felt by their American colleagues.

E. Forceful Judicial Personalities

A court on which sits a judge with a forceful personality is, other things remaining equal, more likely to engage in judicial lawmaking than is a

[67] See, for discussions of recruitment and advancement of French judges, Morel, *loc. cit. supra* note 52, §140, pp. 135–36 (critical); Bacon, *loc. cit. supra* note 65, 175 (highly critical); Tyndale, *loc. cit. supra* note 65, 578–80 (critical); Perroud, *loc. cit. supra* note 65, 11–18. The practice of frequent promotions of judges in the lower ranks and the possibility of political control over these promotions has been especially criticized. Control over advancements was placed by the Constitution of 1946 in the Conseil supérieur de la Magistrature, which is also in charge of questions of discipline. See Constitution (1946) arts. 83 and 84. This reform meets some of the criticisms that have been made of the system.

The recruitment and advancement of German civil judges below the level of the Bundesgerichtshof are, subject to standards set out in the Basic Law (arts. 97 and 98) and the Gerichtsverfassungsgesetz (arts. 2–11), regulated by the individual Länder. Though each state has its own system, the differences between the various systems are not great. In general, selection and advancement are in the hands of the Ministry of Justice, with the legislature exercising a varying degree of control through a special committee. See Kern, Geschichte des Gerichtsverfassungsrechts (1954) §67, pp. 320–21.

[68] For France, see Tyndale, *loc. cit. supra* note 65, 575. It is interesting to note that in France it is often said that the professors at the Cour de cassation are more inclined to innovate than are the career judges on that court.

One of the reforms today urged in Germany is to recruit judges from among persons of mature age who have proved themselves in other forms of legal activity. See Weinkauff, *loc. cit. supra* note 65, at 227. In the immediate post-war period, a substantial number of practicing lawyers were named to the bench in Germany in order to fill the depleted ranks.

[69] For France, see Code of Civil Procedure, arts. 116–18; for Germany, see Bader, Die Deutschen Juristen (1947) 16–17; Beradt, Der Deutsche Richter (1930) *passim*. See also note 42 *supra*. "... The customs of civil-code countries do not develop a Bench or Bar of comparable prestige, creativeness or independence. ... Court opinions rarely bear the name of the writer, dissents are not permitted, and the judicial post offers less incentive to originality in the judge. ..." Moreover, "... the [common law] adversary system challenges the originality of the advocate and rewards his resourcefulness by crediting him with a leading case." Jackson, "The Genesis of an American Legal Profession," 38 Am. Bar Assoc. Jour. (1952) 547, at 617. *Cf.* Pekelis, "Legal Techniques and Political Ideologies," 41 Mich. L. Rev. (1943) 665, at 691.

court lacking such leadership. It is important to consider the relative frequency of such judges in each of the systems under investigation. Some of the relevant considerations have been mentioned above: The judge's position in society, methods of recruiting and advancing judges, the content of the judicial opinion, the system's attitude toward dissents, and the extent to which the body of legal precepts operative in the system is a judicial rather than a legislative product. All these point in the direction of forceful judicial personalities being more likely in the American system than in either France or Germany.

We should perhaps underline two of these considerations. The system of recruiting judges in the United States results in men of mature age going from a successful and important career in practice or in public life directly to a court of importance. Such men have usually played significant roles before their elevation to the bench. They bring to it the force of character and energy that brought them into prominence. Such judges are likely to find self-expression in judicial lawmaking. In France and Germany, on the other hand, the judge usually enters the judiciary while still quite young and without broad practical experience. Though there is no legal bar to appointing practicing lawyers to the bench, in normal periods such appointments are not usual for a variety of reasons. The decision to seek a judicial career is ordinarily made shortly after completion of legal training. The system of promotion would be disturbed if lawyers of mature years were brought to the bench. An appointment to the bench is, moreover, not particularly attractive to a successful lawyer in terms of either prestige or financial reward. Finally, tradition and practice stand in the way of such appointments.[70] Nor is the system of recruitment and advancement particularly suited to attract or encourage the most forceful and energetic personality types. In particular, the fact that advancement is relatively slow and based to a considerable extent upon seniority, probably tends to develop the more bureaucratic and conventional side of a French or German judge's personality.

Another point needing emphasis is that great judges have had a deep and well-recognized influence on the development of the common law. In a very real sense, the judge is the hero of the common law[71] while the

[70] In Germany, there is today an influential body of opinion in favor of reforms that would bring the German practice in this respect closer to that of the United States. See Weinkauff, *loc. cit. supra* note 65, at 227; "Entschliessung der Oberlandesgerichtspräsidenten zum Richtergesetz," 32 Deutsche Richterzeitung (1954) 242.

[71] "... In British law, as received in America, juridical method has as its basis the decision as expounded by a judge. The case and the judge are central. The judge is hero, and the opinion is his weapon...." Franklin, "The Historic Function of the American Law Institute: Restatement as Transitional to Codification," 47 Harv. L. Rev. (1934) 1367, at 1370.

legislator and the great commentator are the heroes of the civil law. An American judge is thus encouraged and stimulated by historical example to leave his mark on the law in a way in which his French and German colleagues are not. These two rather marked encouragements for strong judicial personalities and judicial lawmaking found in the American system are lacking in the French and German systems.

F. The Particularity with which the Existing Body of Legal Precepts Accommodates Patterns of Interest

Legal precepts authoritatively accommodating interests in a fairly generalized fashion tend to encourage judicial lawmaking. Provisions of law couched in fairly general terms necessarily give the judge less precise indications as to how a particular case should be decided than do more detailed provisions. Provisions of the former type contained in a code or statute can be considered, in a sense, legislative delegations of a policy-making function to the courts.[72] Judges find it analytically and psychologically easier to conclude, when faced with such general norms, that judicial lawmaking is proper. Moreover, such norms can, because of their general or abstract form, usually provide a basis for rationalizing any one of several different decisions.

It is difficult to generalize concerning the degree of particularity with which interests have been accommodated and social values stated in the three systems under discussion. A code system, such as the French or German, contains some very general and abstract provisions[73] and others

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Consider also the impact which such judges as Marshall, Story, Holmes, Brandeis and Cardozo have had upon the law as practiced in the United States.

[72] "The provision [Article 106, which, with some modifications, is now Article 138 of the Civil Code] represents an important legislative step which is perhaps not without some difficulties. Judicial discretion is given a sphere of activity such as it has never had before in such a large area of the law. . . ." 1 Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches für das Deutsche Reich (1888) 211. See also Steinbach, "Die 'Guten Sitten' im Rechte," 4 Deutsche Juristenzeitung (1899) 47–50.

[73] "The first paragraph of Article 1384 [of the French Civil Code] was enacted in a much earlier era, in a period of stage coaches and one-horse *chaises*, but at a time when they knew how to draft a statute not only for that time, not only for the needs of the moment, but for the future. These provisions, some taken from our ancient law, some from Roman law, others from customary law, others from the written law, have the advantage of stating general principles. Whenever one talks with a foreign lawyer and discusses with him the scope of an article of our Civil Code, especially in its title '*Des obligations*,' he always expresses his profound admiration for these articles containing formulae so supple and yet at the same time so precise, so large and so comprehensive that, formulated at the time of the horse-drawn carriage, they are equally applicable to the automobile and even to the airplane."

Statement of Procureur Général Matter to the Cour de cassation in Jand'heur v. Les Galeries belfortaises, Cass., ch. réunies, 13 February 1930, D. 1930. I. 64, at 70.

that are quite detailed and specific.[74] Examples of the former are the five articles in the French Civil Code covering the law of delictual obligations (torts)[75] and the so-called "general clauses" of the German Civil Code.[76] Examples of the latter are found in many parts of the French and German Codes, especially in the family, succession, and property laws. A workable code must keep a balance between specific and general provisions. The latter are used where the code is to be comprehensive and systematic and frequent legislative revision is impractical.[77] In these areas, judicial lawmaking is rather likely whenever social and economic conditions or social values have changed.

In a system of case-law such as is found in the United States, the degree of particularity with which interests are authoritatively accommodated does not vary as much. A mature case-law system contains a vast body of precepts authoritatively accommodating fairly specific patterns of interests. In such a system, a court is not likely to start its reasoning with a proposition as abstract and general as are some of the provisions of the French and German Civil Codes. Thus, an American judge puzzled by some problem of tort law does not usually begin his reasoning with a broad principle; he is more likely to start with a rather specific proposition of the type exemplified by most of the nine hundred and fifty one sections of the Restatement of Torts. In dealing with a problem of delictual obligation (tort law), the French judge calls upon five articles of his Civil Code that purport to cover the entire field. A German judge, faced with the same problem, looks (unless the matter is covered by special legislation) to the thirty pertinent articles of the German Civil Code. So far as this element in the total situation is concerned, French and German judges are more likely than their American colleagues to engage in judicial lawmaking.

Moreover, a case-law system tends, by its very nature and through

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[74] *Cf.* Tunc, Book Review, 3 Revue Internationale de Droit Comparé (1951) 553, at 556–57.

[75] Articles 1382–1386.

[76] Article 242 of the German Civil Code provides as follows: "The debtor is bound to effect the performance according to the requirements of good faith, ordinary usage being taken into consideration." Other important general clauses are Articles 138, 157, 226, and 826 of the Civil Code. See generally Hedemann, Die Flucht in die Generalklauseln (1933); see also "Von der Aufgabe und Würde des Richters," 32 Deutsche Richterzeitung (1954) 242.

[77] One cause of the failure of the Prussian Allgemeines Landrecht (1794) was its great detail and particularity. Julliot de la Morandière, then Dean of the Faculty of Law of Paris and President of the Commission for the Reform of the French Civil Code, said during the proceedings of the Commission that "I am persuaded that the work of the Council of State has gained greatly from the absence of an administrative code and that the private law has gained from having a Civil Code which did not contain abstract formulations of general doctrine." [1945–46] Travaux de la Commission de Réforme du Code Civil (1947) 142.

the operation of the principle of *stare decisis*, to make its precepts continually more detailed and more precise. This progressively reduces the likelihood of judicial lawmaking, a trend which is reversed only when a court announces a new principle that can form a fresh and less specific starting point for the judicial treatment of future cases. Particularity is often still more marked when an American court finds its authoritative precept in a statutory provision because of the more rigid application in this area of the principle of *stare decisis*.[78]

In a code system, on the other hand, the body of legal precepts remains, at least in theory, uninfluenced by the body of decided cases. A legal precept in a code system thus tends to retain longer its initial level of generality or particularity. This tendency should not be exaggerated. It is, of course, true that a pattern of judicial interpretation emerges in connection with code provisions.[79] A court is always, however, on good theoretical ground when it goes back to the pristine provision. The provisions in their unglossed form thus remain available as starting points for legal reasoning. Moreover, when legislative revisions are relatively infrequent, as tends to be the case, the authoritative accommodations of interests contained in the more detailed code provisions acquire in practice a greater degree of generality as changes in social and economic conditions or social values emphasize the need to consider such provisions as drafted not only for the needs of the moment but also for the future.

G. The Likelihood of Another Organ of Government Effectively Solving the Problem

Judicial lawmaking becomes more likely if there is small probability that a given problem will be effectively solved by another organ of government, for example, the legislature. This is in part a question of the limitations inherent in each of the various processes of government. Some problems in their very nature are not suitable for judicial resolution; thus where the only effective solution requires the creation of a licensing system or the use of other regulatory devices, society will expect legislation and administrative action. It is also a matter of tradition: Is the area one in which the courts have traditionally operated? American courts find, so far as this latter element in the total picture goes, in the common-law tradition of judge-made law greater encouragement to lawmaking than do French and German courts functioning in a codified system.

[78] See note 5 *supra*.

[79] See Coing, "Allgemeine Rechtsgrundsätze in der Rechtsprechung des Reichsgerichts zum Begriff der 'guten Sitten,'" 1 Neue Juristische Wochenschrift (1948) 213.

The present-day effectiveness and resoluteness of the other branches of government must also be considered. In all three of the countries under consideration, the pressure of legislative business has grown in recent years. This has probably led to a decline in the legislature's interest in, and capacity to deal effectively with, private law matters. To this extent, judicial lawmaking becomes more appropriate.

In the American legal system, this general problem has a special aspect because of the institution of trial by jury. In certain areas, for example, automobile accidents, the jury, through its control over the facts, modifies in practice various rules of law.[80] The contributory negligence principle has probably become, in jury practice, a rule of comparative negligence.[81] At times, the jury modifies the strict fault principle of the common law in the direction of liability without fault.[82] One result is to reduce the pressure on the common law courts to reformulate existing rules to take changed economic and social conditions into account. French and German courts, on the other hand, must themselves face such issues without the escape afforded by a largely independent finder of fact.

H. Practical Limitations on Judicial Lawmaking

When a court comes to reformulate existing, or formulate new policy, several inherent characteristics of the judicial process limit what it can effectively do.[83] Problems come before the courts in a somewhat haphazard fashion. Private parties argue their particular interests without attention to broader considerations except in so far as their cause may be thus advanced. Judges are usually not specialists. The fact-finding procedures available to the courts are inadequate for full-scale investigations of economic desirability and practicality. Courts usually cannot work out compromise solutions, but must give judgment for one party. Nor can a court easily control or limit the various ramifications of its decisions or develop new regulatory devices.

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[80] See McNiece and Thornton, "Is the Law of Negligence Obsolete?" 26 St. John's L. Rev. (1952) 255, at 269–70.

[81] See Ulman, A Judge Takes the Stand (1933) 31–32.

[82] See McNiece and Thornton, *loc. cit. supra* note 80, at 268.

[83] Justice Frankfurter's remarks with respect to constitutional adjudications have a general pertinency:

"... Moreover, settlement of complicated public issues, particularly on the basis of constitutional provisions conveying indeterminate standards, is subject to the inherent limitations and contingencies of the judicial process. For constitutional adjudications involve adjustment of vast and incommensurable public interests through episodic instances, upon evidence and information limited by the narrow rules of litigation, shaped and intellectually influenced by the fortuitous choice of particular counsel."

Frankfurter, "John Marshall and the Judicial Function," 69 Harv. L. Rev. (1955) 217, at 234.

These considerations operate in all of the systems under discussion to inhibit under some circumstances judicial lawmaking. The attitude expressed by Mr. Justice Brandeis in dissent in *International News Service v. The Associated Press* has a place in every legal system:

"Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set on any property right in news or of the circumstances under which news gathered by a public agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for the enforcement of such regulations. Considerations such as these should lead us to decline to establish a new rule of law in the effort to redress a newly-disclosed wrong, although the propriety of some remedy appears to be clear."[84]

These practical limitations upon judicial lawmaking of certain kinds and in certain situations are found in all the systems under discussion. Two special aspects of these limitations are further discussed below—whether the lawmaking activity of one court will in practice be accepted by the judiciary as a whole; and the effect of court procedures and rules of evidence on the court's ability to obtain information needed for a full understanding of the issues raised in a case up for decision.

1. Legal unity and judicial lawmaking. If judicial reconsideration and reformulation of policy is to be effective, innovations must in practice be accepted by the whole judiciary. In the United States, unity of judicial action within a given jurisdiction is ensured by the rule that a court has no right to deviate from precedents established by its hierarchical superior.[85] Quite the contrary rule is found in France, and to a lesser degree in Germany.[86] The French rule is still today that a previous deci-

[84] 248 U.S. 215, 248, at 267 (1918). See also Judge Learned Hand in Cheney Bros. v. Doris Silk Corporation, 35 F. 2d 279, at 281 (2nd Cir. 1929); Callmann, "He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition," 55 Harv. L. Rev. (1942) 595, 608–610 (argues for increased judicial sphere of action).

[85] Less restrictive views of the functions of the lower courts have recently been expressed:

"... [O]ur function cannot be limited to a mere blind adherence to precedent. We must determine with the best exercise of our mental powers of which we are capable that law which in all probability will be applied to these litigants and to others similarly situated. If this means the discovery and applying of a 'new doctrinal trend' in the court [citation omitted], this is our task to be performed directly and straightforwardly, rather than 'artfully' dodged."

Judge Clark in Spector Motor Service v. Walsh, 139 F. 2d 809, at 814 (2nd Cir., 1943), *rev'd* 323 U.S. 101 (1944). See also Barnette, et al v. West Virginia State Board of Education, 47 F. Supp. 251, 252–53 (S.D.W.Va. 1942), *aff'd* 319 U.S. 624 (1943); Recent Case, 56 Harv. L. Rev. (1943) 652; Comment, "The Attitude of Lower Courts to Changing Precedents," 50 Yale L. Jour. (1941) 1448.

[86] Prior to the last half of the nineteenth century there are several examples in Germany

sion, even by a hierarchically superior court, is never binding.[87] Historically, the French rule is explained, at least in part, by a desire to prevent any systematic, judicial formulation and development of policy.[88]

In practice, a lower French[89] or German court[90] is today under strong

of legal systems giving binding force to precedents of the highest court. See generally 1 Stobbe, Handbuch des Deutschen Privatrechts (1882) 162–68. All such provisions were set aside by the legislation of 1877 on the administration of justice. See Enneccerus, *op. cit. supra* note 20, §42, p. 169, n. 5. Proposals have been made, but never accepted, to make the decisions of the highest regular court binding upon all lower courts. See Schiffer, *op. cit. supra* note 61, 178–82.

Today, no rule comparable to the *stare decisis* principle is recognized in German law. However, "[i]t is hard to see the practical difference [between *stare decisis* as it is actually practiced in the United States] and the German system of established practice (*ständige Praxis*) and the liability of a notary, as declared by the Reichsgericht." Rabel, "Deutsches und Amerikanisches Recht," 16 Zeitschrift für Ausländisches und Internationales Privatrecht (1951) 340, at 345. There may be even some cases in which a lower court judge would be liable under Article 839 of the Civil Code if he consciously departed from a line of decisions of the highest regular court. *Cf.* D. v. Preussischer Fiskus, Reichsgericht, Third Civil Senate, 19 May 1914, 85 ERG (Z) 65. See also 1 Gierke, Deutsches Privatrecht (1895) 177–79. It is interesting to note that the Bundesgerichtshof maintains (see §18 of Bekanntmachung der Geschäftsordnung des Bundesgerichtshofes, *loc. cit. supra* note 42), and the Reichsgericht formerly maintained, a full and current collection of its decisions "so that a Senate cannot overlook a previous decision." See Danckelmann, *loc. cit. supra* note 47, at 702.

[87] Today a decision of the united chambers of the Cour de cassation is binding, though only for the particular litigation, upon the Cour d'appel to which the matter is sent for final disposition.

Such was not always the case. For many years the French system refused to apply the principle of hierarchy even in the handling of an individual case. In any litigation the lower courts could twice refuse to accept the view held by the Cour de cassation as to the proper disposition of the case. See art. 21 of the Décret portant institution d'un tribunal de cassation et réglant sa composition, son organisation et ses attributions of 27 November–1 December 1790, 10 Sirey, Recueil Général des Lois et des Arrêts (1843) 79–80; art. 21 of the Constitution of 3 September 1791; art. 256 of the Constitution of 5 Fructidor, An III (22 August 1795); Loi qui détérmine le cas où deux arrêts de la cour de cassation peuvent donner lieu à l'interprétation de la loi of 16 September 1807, 10 Sirey, *id.* 755; Loi relative à l'interprétation des lois of 30 July 1828, *id.* 1190–91. The Cour de cassation had then to refer the matter to the legislature for a determination that formed the basis of a final decision by the Cour de cassation in the matter. This arrangement, which was abandoned in 1837 (see Loi relative à l'autorité des arrêts rendues par la Cour de cassation après deux pourvois of 1 April 1837, S. 1837. II. 204), had several effects: it rendered it probable that most policy conflicts not resolved in the written law would be referred to the legislature; it substantially reduced the number of situations in which the legislature failed to consider changes in the law resulting from new social and economic developments; finally, it probably tended to make rather exceptional judicial reformulations of legislative policy.

[88] See 1 Bousquet, Explication du Code Civil (1804) 16; Report submitted by Parant to the Chamber of Deputies at its session of March 14, 1837, S. 1837. II. 204, at 205.

[89] At times the courts of appeal have been rather insistent in their refusal to follow the decisions of the Cour de cassation.

"... However, even after that decision [Epoux Bessières v. Compagnie des voitures, l'Abeille, Cass. civ., 29 July 1924, D. 1925. I. 5], a rather large number of courts of appeal continued to make the suggested distinction between the act of a person and the act of an object, and refused to allow the victim of an automobile accident to invoke the presumption

pressure to conform to the views of its hierarchical superior. A court that does not accept the lines laid down by the decisions of courts superior to it faces probable reversal.[91] This is not only expensive for the parties but also unpleasant for the lower court, especially, when, as in France and Germany, advancement within the judicial hierarchy depends to a certain extent upon an evaluation of a judge's work. Today in these three systems no marked difference exists with respect to this potential limitation on judicial lawmaking.

2. Court procedures and rules of evidence. An American court is at times insulated to a considerable extent from the facts of a case before it, and the presentation of background material rendered difficult, by exclusionary rules of evidence, especially the hearsay rule, and by a tradition of forensic procedure relying on direct and cross-examination.[92] These limitations can, in some situations, be surmounted in part by the use of briefs setting forth sociological and economic fact—the so-called Brandeis brief.

French and German law know few exclusionary rules of evidence; in particular there is no hearsay rule, and witnesses are allowed to testify in narrative form; consequently, relatively few difficulties of this nature are encountered in bringing the factual background of a case to the court's attention.[93] Moreover, French and German courts call experts to appear

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of fault established by subsection one of Article 1384 of the Civil Code when the accident was due to a vehicle under the control of a driver. [Citation omitted.] . . . It was necessary to settle the case law (*jurisprudence*). The new decision of the civil chamber ends all the doubts which should never have arisen, and will, it must be hoped, prevent a renewal of the argument. . . . If, hereafter, a court of appeal persists in refusing to apply in such a case the rule of responsibility for the acts of objects, the court would be refusing to follow—as, incidentally it is entitled to do—the rule laid down by the Cour de cassation. Such a refusal, which is very unlikely, would be overcome by a decision of the united chambers of the Cour de cassation."

Note by Ripert to Jand'heur v. Les Galeries belfortaises, Cass. civ., 21 February 1927, D. 1927. I. 97.

[90] ". . . The lower court, from practical considerations, feels bound; and the judge's psychology in rendering judgment is entirely understandable when he reflects that it would be futile to depart from the current pronouncement of the Supreme Court, for in any case review proceedings would finally restore the other decision with a resultant waste of time, money and effort."

Sauer, "Die Grundsätzliche Bedeutung der Höchstrichterlichen Rechtsprechung für Praxis und Wissenschaft," in 7 Die Reichsgerichtspraxis im Deutschen Rechtsleben (1929) 122. See also note 86.

[91] See Meijers, "Case Law and Codified Systems of Private Law," 33 Jour. of Comp. Leg. and Int. Law (3rd ser. 1951) Parts III and IV, 8, at 11.

[92] See, for example, the discussion of the difficulties that may be encountered in proving the business background of a case, in Fuller, Basic Contract Law (1947) 415–18. See also Beuscher, "The Use of Experts by the Courts," 54 Harv. L. Rev. (1941) 1105.

[93] The practical importance of Article 1341 of the French Civil Code, requiring written

as court witnesses.[94] Reliance is not ordinarily placed, as in American practice, upon expert witnesses controlled by the parties. Finally, in proceedings involving commercial matters, specialized courts of first instance, staffed in whole or in part by merchant, non-professional judges, are available in France and Germany.

In these respects, French and German courts may be in a better position to get at the facts and obtain background information than are their American counterparts. On the other hand, American courts benefit from a more adequate preparation by the lawyers of the factual side of the controversy than is ordinarily true in France and Germany. This difference in preparation derives in part from a greater concern in American law with factual questions.[95] Moreover, as a matter of general practice, French and German lawyers do not interview witnesses before they appear in court. Finally, in those American jurisdictions having an approach similar to that of the Federal Rules of Civil Procedure, there are avail-

proof in many situations, has been steadily reduced in practice. See Rousseau, Note to Doudou Hadj Ali ben Mahieddine v. Batifort, Cass. civ., 15 May 1934, S. 1935. I. 9–10, ns. 1–2; Hébraud, Comment on Law of 23 May 1942, D. 1943. Leg. 10–14; Meurisse, "Le déclin de la preuve par écrit," Gaz. Pal. 1951. D. II. 50.

[94] For France, see Code de Procédure Civile, arts. 305–06; see also Morel, *op. cit. supra* note 52, §§501–06, pp. 402–07. For Germany, see Zivilprozessordnung, arts. 144, 404, 407, 418; see also Rosenberg, Lehrbuch des deutschen Zivilprozessrechts (6th ed. 1954) §120, pp. 550–60; Schönke, Lehrbuch des Zivilprozessrechts (7th ed. 1951) §66, pp. 264–68.

It seems clear that in the United States the judge has the power to call an expert witness for the court. See 9 Wigmore, A Treatise on Evidence (3rd ed. 1940) §2484, p. 270; 2 *id.* §563, pp. 648–56. This is not common practice, however, probably because of the adversary nature of common law procedure and because the court usually has no funds available to compensate the expert witness. Legislation has recently been proposed, and enacted in some states, to make it easier for a court to obtain experts of its own choosing. See *id.*, §563, pp. 649–56; Beuscher, *loc. cit. supra* note 92, 1105–06. On expert testimony generally in the United States, see "Symposium on Expert Testimony," 2 Law & Cont. Prob. (1935) 401–524. An experiment, financed by private funds, in which a panel of medical experts is made available to the court in personal injury cases has been conducted in New York City. See Impartial Medical Testimony (1956); Hecht, "Expediting Trial of Cases in New York County," 287 The Annals (May, 1953) 134.

[95] This should not suggest that on the Continent the factual side of the case is ignored. A leader of the French bar wrote in his memoires:

> "In my first cases . . . I stated my facts in a few words, in a dry . . . manner. I then turned to the law (*droit*) and, having recently graduated from law school, citations of Roman law, of authors and of decisions were not lacking. The judges did not appear to be very impressed by all this. The old *avocats*, quite to the contrary, studied their facts with great care, trying to present them in a favorable manner, seeking to influence the judges in favor of their clients, combating the law (*droit*) with equity. . . . I saw the effects this produced upon the judges; they are men, they have also . . . passions and sensibilities. The appeal judges consider themselves above all as the final judges of fact, as judges in *equity* before they are the interpreters of the science and, ordinarily, they do everything they can to base their decisions on the *circumstances of the case* so as to avoid cassation later which is possible only for a violation of law."

1 Dupin, Mémoires (1855) 9–10.

able discovery and related techniques for probing the factual side of the controversy unknown to French and German law. To the extent that discovery and related pre-trial procedures are used to define the matters at issue and prevent surprise at the trial, other institutions and techniques serve these functions in French and German law. Neither French nor German law provides, however, any way in which a comparable investigation of the factual questions at issue in the litigation can be undertaken.

At the first level of review proceedings (full appeal), the *appel* in France and the *Berufung* in Germany, it is in one respect rather easier for the continental court than for its American counterpart to consider fully all the facts of the case. In both continental systems, a court upon full appeal can retake evidence and hear new evidence. This is technically possible in some jurisdictions of the United States in certain kinds of actions; but such powers are hardly ever used in practice.

In another respect the tables are turned with regard to consideration of the factual side of the case in the course of review proceedings. In France and Germany, the whole court file goes up with a case both on full appeal and on *pourvoi en cassation* or *revision*, these latter constituting the final level of review and limited to questions of law. Ordinarily, only one copy of this file, including the pleadings, summaries of the evidence taken, and memoranda on law, is available. This contrasts sharply with the American system in which each judge is regularly given a printed copy of the verbatim transcript of record (subject to such omissions as are stipulated by the parties in the interest of economy) and of the briefs. Under French and German practice, one judge, the reporter, has the task of studying the file and reporting to the full bench on the case. The file will also be read by the presiding judge. If no issue arises in conference, the other judges do not ordinarily study the file. In analogous American proceedings, each judge usually studies his copies of the printed record and briefs before the oral argument.

I. The Problem of Stability and Legal Security[96]

In dealing with the inevitable fact of change in social and economic conditions, a legal system usually strives to minimize the disruptive effects of such change upon existing relationships. This involves a consideration of the appropriateness in the particular situation of judicial lawmaking. In those areas of life in which relationships are shaped by expectancies either of the layman or the lawyer, judicial disregard of

[96] See, for interesting discussions of the problem of stability and legal security, Llewellyn, Präjudizienrecht und Rechtsprechung in Amerika (1933) 76–86; Fuller, *loc. cit. supra* note 29, 431–38.

these expectancies can have a very disruptive effect. Courts tend, in a particular case, toward the type of judicial activity anticipated by the system. The expectancies of lawyers[97] and, though to a far less degree, also of laymen,[98] are conditioned in part by the general attitude of the system toward judicial lawmaking. Hence, in areas in which courts have in the past made law, judicial lawmaking of the same character and degree in the future is less disruptive and, consequently, more likely. Conversely, in a climate of opinion accustomed to the court's refusing to make law in the face of social and economic change and development, the sudden emergence of judicial lawmaking is apt to be more disruptive and, for that very reason, less likely. The likelihood of judicial lawmaking in this latter case is still further reduced in systems such as the French and German in which concurring and dissenting opinions are not allowed. In the United States, the full discussion contained in court opinions, taken together with concurring and dissenting opinions, usually foreshadows judicial lawmaking, thus rendering lawmaking within the range of previous discussion less disruptive when it actually takes place. Some of the problems of stability and legal security could be rendered less troublesome if the courts were given the power to handle in one way relations established *before* the courts had dealt with the matter, and in another relations established *thereafter*. In exercise of such a power, a court could decide the actual controversy before it by following one rule and at the same time announce a new rule to be followed in the future. Under such a system, judicial acquiescence and judicial lawmaking could be combined in one decision. No attempt has been made in France or Germany to develop a technique permitting such a disposition of a case.[99] In view of the position taken by accepted French and German theory that a decision does nothing more than dispose of the case before the court, its development would be very difficult. Attempts have been made to introduce this procedure into American practice.[100] They have not

[97] The problem of prediction by lawyers in the United States is probably complicated by the tendency of lower courts to consider themselves absolutely bound by previous decisions of their appellate superior, thus centering creative judicial activity in the courts of last resort. See page 198, *supra*; note 85. A lawyer may have to consider whether a particular transaction could support the expense of litigating a possible dispute through to the court of last resort.

[98] A layman's expectancies may be somewhat more affected by "legal" considerations in a code system, such as the French or German, which presents basic principles in a fairly readable and compact form, than in a common law system.

[99] See 1 Roubier, Les Conflits de Lois dans les Temps (1929) 25–32 (includes some discussion of the United States law on the question).

[100] See, *e.g.*, Great Northern Railway Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932); concurring opinion of Judge Frank in Aero Spark Plug Co., Inc. v. B. G. Corporations,

been completely unsuccessful but, due to both practical and theoretical difficulties, little real progress has been made. In particular, the practice of prospective overruling would ordinarily render the plaintiff's victory pyrrhic, thus discouraging litigation of the question except by institutional litigants. Such influence as these developments have had on the approach of the American system to the problem of stability and legal security probably lies in guiding legal thinking to the recognition that these are terms simply describing the citizen's reasonable expectancies.

III. CONCLUSION

We have attempted to analyze comparatively, firstly, the theories of judicial decision current in France, Germany, and the United States and, secondly, certain of the elements that influence the judicial process in each system. Several tentative conclusions emerge from the comparisons made and the range of historical and institutional fact considered:

In the first place, the variety and complexity of the interacting elements affecting the operations of the judicial process in each system suggest that sweeping generalizations cannot be accurate. A general conclusion, for example, that American judges are more likely than French or German judges to make law has little meaning. The problem is so complex and the elements to be weighed so various, that such a judgment is meaningful only if the area of law in question is defined with some precision. The insights to be obtained by examining such variables in the equation as those considered above are relevant for a proper analysis of the problem, but they do not give a basis for definite, generalized conclusions.

Secondly, in all of these systems compensating and offsetting pressures are at work in the areas here considered. For example, certain of the contemporary French theories of judicial decision offer broad encouragement to judicial lawmaking; on the other hand, the French system of recruitment and advancement of judges does not tend to attract personality types likely to exploit fully the possibilities thus offered. Each of these systems is, in a sense, a bundle of counteracting and offsetting tendencies.

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130 F. 2d 290, 292–99 (2nd Cir. 1942); Cardozo, The Nature of the Judicial Process (1921) 145–49; von Moschzisker, "Stare Decisis in Courts of Last Resort," 37 Harv. L. Rev. (1924) 409; Freeman, "The Protection Afforded against the Retroactive Operation of an Overruling Decision," 18 Col. L. Rev. (1918) 230; Carpenter, *loc. cit. supra* note 29; Larremore, "Stare Decisis and Contractual Rights," 22 Harv. L. Rev. (1908) 182; Note, "The Effects of Overruled and Overruling Decisions on Intervening Transactions," 47 Harv. L. Rev. (1934) 1403.

Thirdly, what may be called the "psychological position of the judge" is very significant. Perhaps the most persistent and deep-seated differences between the French and German systems, on the one hand, and the American system, on the other, are to be found here.

Finally, all of these systems possess, institutionally considered, a considerable degree of flexibility. Conscientious and intelligent judicial effort has in each system a considerable opportunity to shape the law.

HERMAN WALKER, JR.

Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice

THE CURRENT United States interest in treaties for the encouragement and protection of foreign investment weds two national policies of long standing. Treaties in support of American citizens and their interests abroad, in line with the prevailing international needs and usages of each era, have been a normal and repeatedly used feature of American diplomacy since the days of the War of Independence. Concurrently, the Republic has from its earliest years favored the free international movement of private capital. This was true when it was an undeveloped, capital-deficient ex-colony; it remains true now that it has become a world power and reservoir of capital, able to help satisfy the investment requirements of others. Then, to the great benefit of its own economic growth, it embodied in its legal system principles favorable to foreign capital;[1] now through treaty negotiations it seeks to project similar principles onto the international plane, a consummation responsive alike to its own economic position and to the contemporary urge for accelerated economic development being manifested by the members of the world community.[2]

HERMAN WALKER, JR., Member of the Foreign Service, was at the time of writing Adviser on Commercial Treaties, Office of International Trade and Resources, Department of State. This article is personal, and without official attribution.

[1] Alexander Hamilton in his celebrated *Report on Manufactures*, an analytical set of recommendations addressed to the first Congress in 1790, had urged such a policy in the following words:

"It is not impossible that there may be persons disposed to look with a jealous eye on the introduction of foreign capital as if it were an instrument to deprive our own citizens of the profits of our own industry. But perhaps there never could be a more unreasonable jealousy. Instead of being viewed as a rival, it ought to be considered as a most valuable auxiliary; conducing to put in motion a greater quantity of productive labor and a greater portion of useful enterprise than could exist without it. . . . [E]very farthing of foreign capital . . . is a precious acquisition." (Taussig, ed., State Papers and Speeches on the Tariff, Harvard 1892, pp. 39–40).

[2] For a recent authoritative exposition of this view, see section entitled "Promoting the International Flow of Goods and Capital" in the President's Economic Report transmitted January 24, 1956 (H. Doc. 280, 84th Cong., 2d sess.), carried in the Department of State Bulletin, vol. XXXIV, pp. 253–57.

I

Treaties for investment purposes deal with the basic legal conditions which influence the degree to which potential investors are willing to venture their capital in undertakings in a foreign land. They aim, on a joint consensual basis, to establish or confirm in the potential host country a governmental policy of equity and hospitality to the foreign investor. This means, above all, assurance that the enterprise and property of the alien will be respected and that he will be accorded equal protection of the laws alike with citizens of the country. This fundamental idea, then, is the raw material from which the variegated content of the treaties is elaborated.

The principal vehicle advocated by the United States Government thus to deal by agreement with the ground rules affecting investment is the bilateral treaty of friendship, commerce, and navigation—"FCN treaty" or "commercial treaty" for short. In the last ten years, such treaties have been signed with 15 countries,[3] and others are in course of negotiation. The FCN treaty-type became the chosen instrument presumably because it afforded a ready-made framework into which the desired provisions could conveniently be fitted, and because past experience had demonstrated its negotiability. The diplomatic *desiderata* of precedent and tested practicability favored it.

This type of treaty is an instrument widely used by nations over the years to provide the juridical basis for their economic intercourse and to strengthen ties of good neighborliness in their everyday relations. It acquired in time a familiar and distinctive form and character, as a normal medium through which to provide extensively for the rights of each country's citizens, their property and other interests, in the territories of the other, and for the rules mutually to govern their trade and shipping. Around this central theme, this treaty-type has repeatedly proved its

[3] *China*, 1946 (63 Stat. pt. 2, 1299); *Italy*, 1948 (63 Stat. pt. 2, 2255) supplemented by Agreement of September 26, 1951, S. Exec. H, 82d Cong., 2d Sess.); *Ireland*, 1950 (1 UST 785); *Colombia*, 1951 (S. Exec. M, 82d Cong., 1st Sess., withdrawn from Senate, June 30, 1953); *Greece*, 1951 (TIAS 3057); *Israel*, 1951 (5 UST, pt. 1, 550); *Denmark*, 1951 (S. Exec. I, 82d Cong., 2d Sess.); *Japan*, 1953 (4 UST, pt. 2, 2063); *Federal Republic of Germany*, 1954 (S. Exec. E, 84th Cong., 1st Sess.); *Haiti*, 1955 (S. Exec. H, 84th Cong., 1st Sess.); *Nicaragua*, 1956 (S. Exec. G, 84th Cong., 2d Sess); *Netherlands*, 1956 (S. Exec. H, 84th Cong., 2d Sess); Uruguay, 1949 (S. Exec. D, 81st Cong., 2d Sess.); *Ethiopia*, 1951 (4 UST, pt. 2, 2134); and *Iran* (S. Exec. E, 84th Cong. 2d Sess). These treaties fall into three patterns. Those succeeding the China and Italy treaties reflect an extensive reorganization and condensation of the content. The Ethiopia and Iran treaties represent a further abridgment of this material, and add provisions on diplomatic and consular rights. All are substantially similar, however, with regard to the points discussed in this article, except as otherwise noted and except that the Ethiopia and Iran treaties lack some of the refinements found in the others. They all bear the same title, except that in the Uruguay case the term "economic development" occurs, and "amity and economic relations" in the case of Ethiopia and Iran.

flexibility and its adaptability to the varying needs of different eras. Its history of use by the United States antedates the Constitution. Our first treaty, in fact, was a Treaty of Amity and Commerce, concluded in 1778 with France,[4] as part of the arrangement which brought that country into our Revolutionary War as an ally. Numerous other examples followed, with countries of all conditions and locations, and with varying emphases and motivations, depending on the circumstances of the day.[5]

In more recent times, following World War I, such treaties were designed especially to promote international trade; and they afforded the medium through which this country embraced the unconditional form of the most-favored-nation clause. But latterly, since the enactment of the reciprocal Trade Agreements Act in 1934, other conventional tools of a special sort have been fashioned and employed to serve trade promotion and regulation: the bilateral trade agreement and now the GATT (the General Agreement on Tariffs and Trade).[6] With the consequent decrease of emphasis on the FCN treaty's role in international trade, the instrument lay ready to hand following World War II to be retooled to fit the newly-crystallized investment need.[7] This retooling did not mean abandonment of the old; the treaty remains one of commerce and navigation, *inter alia*. It meant rather a shift in orientation and internal balance, with the refinement, building up, and supplementing of familiar features especially pertinent to investor requirements. How this has been done may be described as follows.

[4] Others of the pre-Constitution era included those with the Netherlands (1782), Sweden (1783), and Prussia (1785).

[5] A recent publication mentions the figure "more than 130," counting those of smaller scope and size (Department of State Fact Sheet entitled "Commercial Treaty Program of the United States," March 1952, p. 3). For the various purposes historically served by these treaties, see *ibid* and Setser, "Treaties to Aid American Business Abroad," XL Foreign Commerce Weekly (U.S. Dept of Commerce, Sept. 11, 1950), pp. 3 *et seq.*

[6] Originally negotiated at Geneva, 1947, and now adhered to by 35 countries. The present text, with pending revisions, was published in a State Department pamphlet under date of March, 1955; and a summary explanation in Department of State Publication 5813, April, 1955.

[7] The change in the country's international capital position did not, of course, suddenly occur at this point of time. Even before the first World War, when the United States was the world's leading creditor nation, American investments abroad were growing, especially beginning about 1900. The graph of its creditor status between the two Wars, moreover, was uneven, there being periods in the 30's and early 40's when the net capital flow was markedly inward; and considerable foreign investment continues still to be made here. For the evolution of the United States position, see Lewis, America's Stake in International Investments (Brookings, 1948); Sammons, "International Investment Position of the United States," XVIII Foreign Commerce Weekly (January 27, 1945) 5–7; Pizer and Cutler, "International Investments and Earnings," Survey of Current Business (U.S. Department of Commerce), August 1955, pp. 10–20. See also, e.g., the summaries in Young, The International Economy (3rd ed. 1951) 497–502; and the OEEC Report on International Investment (Paris, 1950) 13–28.

II

"Investment" may be summarily defined as the joining of an investor (a person) and capital (property) into a gainful enterprise (a business activity). FCN treaties traditionally have contained so-called establishment provisions dealing more or less with these three elements: the right of citizens of each country to establish and carry on business activities within the other and to receive due protection there for their persons and property. The range of activities covered, though originally tending to be confined primarily to international trade and that which was relevant or incidental thereto, came in time to cut across commerce and industry generally. Moreover, the basic rule to govern the conduct of such activities has long since been settled, in United States treaty practice, as "national treatment": that is, equality of treatment as between the alien and the citizen of the country. The former thus is entitled freely to carry on his chosen business under conditions of non-discrimination, and to enjoy the same legal opportunity to succeed and prosper on his merits as is allowed citizens of the country. It has become settled, also, that he and his property shall receive not only equal protection, but also a certain minimum degree of protection, as under international law, regardless of a Government's possible lapses with respect to its own citizens.

In respect of the range of covered activities and the quality of the protection vouchsafed, therefore, past treaties have contained the ingredients of an investment policy. The same has not been so, however, in respect of the persons for whom rights were provided, as these treaties were concerned with "citizens" or "nationals," and were concerned with corporations not at all or only to a minor degree. This attitude of reserve toward corporations was manifested in the treaties of the inter-War period, as follows:

> "The right of such corporations and associations of either High Contracting Party so recognized by the other to establish themselves within its territories, establish branch offices and fulfill their functions therein shall depend upon, and be governed solely by, the consent of such Party as expressed in its National, State, or Provincial laws."[8]

This deficiency was a most serious one from the investment viewpoint, since international investment in modern times is predominantly by corporate, rather than individual enterprise. The first task in developing a

[8] E.g., Article XII, Treaty of Friendship, Commerce and Consular Rights with Germany, 1923. U.S. treaty policy regarding corporations is discussed in the author's article "Provisions on Companies in United States Commercial Treaties," 50 Am. Jour. Int. Law, 373–93 (1956).

treaty pattern after the late War, consequently, was to devise ways of providing adequately for the rights of corporations. This posed a special problem for the United States: namely, how in the reciprocal context of an FCN treaty to formulate commitments which would be meaningful while at the same time avoiding interference with the constitutional prerogatives of the several States of the Union over the admission and regulation of foreign corporations.[9] But it so happens that a corporation is "foreign" in any given State by virtue of having been chartered in another, any other, jurisdiction; and a corporation of a sister State is "foreign" equally with one of a foreign country. The solution found, accordingly, was an interpretative clause which for treaty purposes simply assimilates the corporations of the other Party, in any State of the Union, to those of other States of the Union.[10]

With this interpretative formula, the way was open to deal with corporations as fully as with individuals; and this has been done by extending to corporations, in measure equally with natural persons, the benefits of the national treatment and other rules of the treaty, in all situations pertinent to corporations. But so to provide for corporations of each Party in the territories of the other is still insufficient; investors choose to operate abroad not only through branches of corporations of their own country, but also very frequently through subsidiaries chartered under the laws of the foreign country where operations are conducted. Systematic treatment, therefore, required the introduction of provisions to cover this situation, a step representing something of a departure from traditional treaty concepts. Normally and classically, a country extends diplomatic protection abroad for objects which are, and because they are, juridically identified with it—e.g., for individuals who are its nationals, for entities which owe their existence to its laws, for ships which fly its flag. Here however, treaty protection is gained for entities not so identified; the "corporate veil is pierced" for the purpose of making economic interest, rather than legal relationship, the justification and the basis for protection.[11]

[9] This constitutional principle was settled by the Supreme Court in Paul v. Virginia, 8 Wall. 168 (1868); and the treaty-making problem it posed was alluded to in Hearing before the Committee on Foreign Relations U.S. Senate, 68th Cong., 1st Sess. on Treaty of Commerce and Consular Rights with Germany, January 25, 1924, p. 21.

[10] E.g., Article XXII, paragraph 4, of the 1953 treaty with Japan. This formula is only superficially nonreciprocal, as it in fact equates the alien corporation to the bulk of its competitors in interstate business.

[11] To this extent, the treaty may be said to reflect what has been called an "enterprise" theory. See, e.g., Kronstein, "The Nationality of International Enterprise," 52 Columbia Law Review 983 *et seq.* (1952). Compare the axiom propounded by Jones "*ex hypothesi*, no state can intervene on behalf of a corporation against its own government," "Claims on

With corporations suitably fitted into the framework of the establishment provisions, the foundation for an investment treaty was laid; and there remained to complete the conversion process by revising and filling in the content of that framework. Partly this involved the restatement of existing provisions; partly, the addition of new material. In the treaties of the inter-War period, the group most recently concluded prior to those of the current program, the main rules bearing on the establishment, conduct, and protection of enterprise, had for the most part comprised a single article[12] out of the approximately thirty articles to which those treaties tended to run. The amplification and supplementation of this material, together with compression and pruning of the remaining material, has eventuated in a text in which investment-related provisions constitute upwards of half the total.[13]

In the treaties of the 20's and 30's, the rights of entry of individuals had been subjected to a sweeping immigration laws exception. Now, however, firm rights are provided for the entry and indefinite sojourn of international traders and principal investors.[14] Though equal provision for subordinate investor-enterprise employees is not yet possible owing to lack of statutory authority, such personnel is to an extent provided for, in that management is assured freedom of choice in the engaging of essential executive and technical employees in general, regardless of their nationality, without legal interference from "percentile" restrictions and the like; and of accountants, engineers and so on, for special internal audits and surveys, without regard for local professional licencing requirements.[15]

Behalf of Nationals Who are Shareholders in Foreign Corporations," 26 Br. YB of Int. Law, (1949) 225, 257. For two recent discussions relative to the same subject, see M. Domke, "Piercing the Corporate Veil in the Law of Economic Warfare," Wisconsin L. R. (January 1955) 77; R. Berger, " 'Disregarding the Corporate Entity' for Stockholders' Benefit," 55 Columbia L. R. (1955) 808.

[12] E.g., Article I of the treaty of 1923 with Germany.

[13] For example, the subject of consular rights was detached, and, in the treaties following that with Italy in 1948 (note 3, *supra*), a condensed statement of the navigation provisions was developed.

[14] E.g., Article I, paragraph 1, of the 1953 treaty with Japan. The visa provision for "traders" has been in all since the 1946 treaty with China; but that for "investors" became possible only with enactment of the Immigration and Nationality Act of 1952 (Sec. 101 (a) (15) (E) (ii)). See Robert R. Wilson "Treaty-Investor Clauses in Commercial Treaties of the United States," 49 A.J.I.L. (1955) 366–70.

[15] E.g., Article VIII, paragraph 1, of the 1953 treaty with Japan:

"Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of

The rule regarding freedom of access to the courts has been clarified and expanded, notably by the incorporation of: a national treatment standard; a clause to prevent the frustration of this right through domestication or registration requirements, in the case of companies; [16] an agreement that the *cautio judicatum solvi* shall not be exacted in any discriminatory manner;[17] and a provision supporting arbitration as a method of settling private controversies, where the parties have contracted to adopt that procedure.[18]

The usual provisions regarding the protection and security of property have been given more definite content by amplification of the concept of the "just compensation" required in the event of expropriation or other taking.[19] Article VI, paragraph 3, of the treaty with Japan, for example, reads:

"Property of nationals and companies of either Party shall not be taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof."

In addition, a provision has been developed to provide in general that expropriations and sequestrations, should they occur, shall be implemented in a non-discriminatory manner (so as, for example, to preclude

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the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations exclusively for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories."

The second part of this provision appeared for the first time in the 1949 treaty with Uruguay.

[16] *Idem*, Article IV, paragraph 1:

"Nationals and companies of either Party shall be accorded national treatment and most-favored-nation treatment with respect to access to the courts of justice and to administrative tribunals and agencies within the territories of the other Party, in all degrees of jurisdiction, both in pursuit and in defense of their rights. It is understood that companies of either Party not engaged in activities within the territories of the other Party shall enjoy such access therein without registration or similar requirements."

[17] *Idem*, Protocol paragraph 1.

[18] *Idem*, Article IV, paragraph 2. This subject is discussed in the author's article "Commercial Arbitration in United States Treaties," in 2 *Arbitration Journal* (1956) 68 *et seq.*

[19] The twelve treaties of the 20's and 30's spoke simply of "just" compensation, given through "due process". In the China treaty of 1946, the statement was expanded to "prompt, just and effective," and this in turn evolved into the wording above-quoted beginning with the treaties signed in 1951.

an unequal selection of enterprises for nationalization).[20] Moreover, to account for the possibility of injurious governmental harassments short of expropriation or sequestration, there is included a general injunction against "unreasonable or discriminatory" impairments of vested interests.[21]

The basic principle of national treatment with respect to engaging in business activities and doing the things necessary or incidental thereto, which forms the heart of the treaty as an investment instrument, has been elaborated to mention the various juridical forms under which an activity can be conducted; to emphasize the owners' prerogatives of control and management; and to assure that also the enterprise, qua enterprise, will receive the stipulated treatment.[22] Attention, furthermore, has been paid to providing some kind of rule with respect to areas of activity which, because of their sensitive nature (e.g. deposit banking, domestic air transport), are in principle excepted from the national treatment commitments applicable to the normal run of commercial and industrial activity. To such areas, the minimum rule of most-favored-nation treatment is extended, so that each Party is obligated to grant treatment at least as favorable as that enjoyed by other aliens.[23] In addition, in recognition of the fact that the exceptions may not always be, and often are not invoked in practice, a qualification to this exception has been introduced, so as to restore the benefits of the national treatment standard to

[20] E.g., Article VI, paragraph 4, second sentence of treaty with Japan:

"Nationals and companies of either Party shall in no case be accorded, within the territories of the other Party, less than national treatment and most-favored-nation treatment with respect to the matters set forth in paragraphs 2 and 3 of the present Article. Moreover, enterprises in which nationals and companies of either Party have a substantial interest shall be accorded, within the territories of the other Party, not less than national treatment and most-favored-nation treatment in all matters relating to the taking of privately owned enterprises into public ownership and to the placing of such enterprises under public control."

This provision first appeared in the treaty of 1948 with Italy.

[21] *Idem*, Article V, paragraph 1. This provision first appeared in the treaty of 1949 with Uruguay.

[22] *Idem*, Article VII, paragraph 1:

"Nationals and companies of either Party shall be accorded national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities within the territories of the other Party, whether directly or by agent or through the medium of any form of lawful juridical entity. Accordingly, such nationals and companies shall be permitted within such territories: (a) to establish and maintain branches, agencies, offices, factories and other establishments appropriate to the conduct of their business; (b) to organize companies under the general company laws of such other Party, and to acquire majority interests in companies of such other Party; and (c) to control and manage enterprises which they have established or acquired. Moreover, enterprises which they control, whether in the form of individual proprietorships, companies or otherwise, shall, in all that relates to the conduct of the activities thereof, be accorded treatment no less favorable than that accorded like enterprises controlled by nationals and companies of such other Party."

[23] *Idem*, Article VII, paragraph 4.

any enterprise which has at one time, as by act of grace, actually been allowed to enter upon operations in the excepted area.[24] That is, either Party may prohibit or limit alien entry into an excepted field of activity; but if, nevertheless, entry has been in fact permitted, the enterprise in question is protected against later discriminations.

Since the sweeping national treatment rule is not feasible, or else is not adequate, in the matters of real property tenure and of taxation, special articles have been needed for those subjects—the first because of inhibitions laid on treaty-making by certain State laws, and the second because of the highly technical nature of the subject-matter and the desirability of having a self-contained rule, independent of the manner and degree to which the national treatment standard might be applicable to engaging in activities. The present treaties continue the practice, followed since 1911,[25] of assuring equality to the treaty alien with respect to leaseholds of property needed in the United States for treaty-sanctioned activities. As to the rights of the American in the other country, some provide merely the same rule, *mutatis mutandis*;[26] but in others the right is enlarged, to assure full national treatment as to all manner of acquiring and holding real property generally, whether by ownership, lease, or otherwise.[27] Mutuality is restored in such instances by a formula which reserves to the other country the right correspondingly to reduce this quantum of treatment in the case of American nationals domiciled in, or corporations chartered by, any State of the Union which maintains alien disabilities in its land laws. Further, there have been added mutual national treatment provisions with respect to acquisition and ownership of securities and other personal property;[28] the protection of patents and industrial property generally;[29] and the right to dispose of property of every kind, both real and personal.[30]

In the field of taxation, the cumulative standards of both national

[24] *Idem*, Article VII, paragraph 2, second sentence:

"However, new limitations imposed by either Party upon the extent to which aliens are accorded national treatment, with respect to carrying on such activities within its territories, shall not be applied as against enterprises which are engaged in such activities therein at the time such new limitations are adopted and which are owned or controlled by nationals and companies of the other Party."

[25] Treaty of Commerce and Navigation of that year with Japan, Article I, first paragraph.

[26] E.g., treaty of 1953 with Japan, Article IX, paragraph 1.

[27] E.g., treaty of 1948 with Italy, Article VII, paragraph 1(b); treaty of 1956 with the Netherlands, Article IX, paragraph 2.

[28] E.g., treaty of 1953 with Japan, Article IX, paragraph 2. The present stage of evolution of this provision was first reached in the treaty of 1950 with Ireland (Article VII, paragraph 2).

[29] E.g., Article X, treaty of 1953 with Japan.

[30] *Idem*, Article IX, paragraph 4.

treatment and most-favored-nation treatment are in principle maintained, in language suited to the requirements of orderly tax administration.[31] Moreover, the principle is made subject to certain exceptions, for example, double-tax conventions and special tax concessions granted only on a reciprocity basis. On the other hand, a stipulation has been added to the effect that a company of one Party doing business in the other shall be taxable by the latter, not on the basis of the company's "world income" as might be permissible under the national treatment rule, but only in respect of such part of its business as is conducted therein.[32]

Among the new provisions added to the instrument is an article on exchange controls,[33] a subject of considerable contemporary importance to businessmen. The drafting of a treaty rule, however, is complicated not only by the comparative intractability of the subject, but also because neither of the normal treaty standards of national or most-favored-nation treatment is adequate or realistic to the regulation of international currency movements in periods of exchange stringency. A further special factor relevant to the making of bilateral agreement is the existence of the International Monetary Fund, having a recognized competence and responsibility in the field. The treaty rule, by appropriate language, accordingly acknowledges the paramountcy of this organism, which is especially charged with freeing the channels of trade and "current" (as distinguished from "capital") transactions; and centers its attention on laying down principles to govern the policies of each Party in servicing investor requirements, especially the remission of earnings and the transfer of capital, to the extent that their Fund commitments and their monetary reserves situation allows them latitude.

Another new area to which attention is given is the phenomenon of the state-in-business. In this connection, a provision is included for the waiver of claims to sovereign immunity on the part of state-owned commercial enterprises that have occasion to do business abroad.[34] Con-

[31] *Idem*, Article XI, paragraph 1–3. The rule is stated in terms of comparative "burdensomeness".

[32] *Idem*, Article XI, paragraph 4.

[33] *Idem*, Article XII. The core provision (paragraph 3) reads:

"... it shall, after making whatever provision may be necessary to assure the availability of foreign exchange for goods and services essential to the health and welfare of its people, make reasonable provision for the withdrawal, in foreign exchange in the currency of the other Party, of: (a) the compensation referred to in Article VI, paragraph 3, of the present Treaty, (b) earnings, whether in the form of salaries, interest, dividends, commissions, royalties, payments for technical services, or otherwise, and (c) amounts for amortization of loans, depreciation of direct investments, and capital transfers, giving consideration to special needs for other transactions ..."

[34] *Idem*, Article XVIII, paragraph 2:

"No enterprise of either Party, including corporations, associations, and government

versely, a provision has been developed to assure that if a state-owned enterprise engages in a commercial activity, within its own country, in competition with an established private enterprise of the other Party, it shall not avail itself of any subventions or other special privileges that would give it an unfair competitive advantage.[35] This provision, being experimental and outside the national treatment context, is necessarily cautious, in view of the absence of any generally acknowledged guideposts. Thirdly, an adaptation of the most-favored-nation principle has been introduced to regulate the awarding of government concessions and contracts,[36] a literal most-favored-nation clause not being compatible with the realities of contract or concession-letting, and a national treatment clause not being compatible with national policy.

The various arrangements of special concern to investors are in turn, in company with all the other arrangements of the treaty, given added force by provision for submission of otherwise unresolvable disputes over interpretation or application of the treaty's terms, to the International Court of Justice for adjudication.[37] The unreserved acceptance of this jurisdiction for the ultimate determination of treaty rights and obligations, on an impartial legal basis, may perhaps be said to rank in significance with the systematic provision for corporation rights, in signalling the outstanding advances which current treaty policy has effected over that prevailing in previous years.

III

In classifying the instrumentality which has been chosen by the United States Government jointly with like-minded governments of other countries to forward investment objectives, two characteristics stand out. First, the FCN treaty is not a special-interest vehicle, but rather one into which investor requirements, with scarcely an express reference to "investment," are fitted as integral parts of a larger regulation of private affairs in international relations. Such a treaty is concerned with the

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agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein."

This provision first occurs in the 1948 treaty with Italy (Article XXIV, paragraph 6).

[35] This provision first appeared in the 1948 treaty with Italy (Protocol, paragraph 2). It is missing from those with Colombia, Japan, Germany, Ethiopia, and Haiti.

[36] E.g., treaty of 1953 with Japan, Article XVII, paragraph 2. The rule is in terms of "fair and equitable treatment as compared with that accorded to the nationals, companies and commerce of any third country."

[37] *Idem*, Article XXIV, paragraph 2.

rights and interests abroad of all citizens, as well as with a much ampler cross-section of foreign commerce and business than is discoverable within the definition of "investment." Secondly, the instrument is negotiated on a bilateral, rather than a multilateral, basis. It has been at times suggested that a different approach be used: a multilateral convention, or special agreements confined to "investment" as such. The advantages ascribed to these alternatives would be that a multilateral convention is calculated to bring sooner universal results through a single negotiation among a large number of countries; and that a special-purpose agreement, for its part, would be speedier because it would allow the negotiations to concentrate on a single subject-matter to the exclusion of extraneous complications.

Experience, however, does not give much ground for hope that a generally acceptable multilateral investment convention, containing a body of provisions satisfactory from the investor viewpoint, is attainable under present circumstances. Each of the at least three major projects for multilateral conventions of an investment nature, which have been undertaken over the last quarter century, has been attended by failure. First was the conference on the treatment of foreigners, convoked at Paris in 1929 under the auspices of the League of Nations after careful preparations.[38] The sessions of this conference ended without accord and with little real prospect that resumed sessions, indefinitely postponed by the onset of the Great Depression, would prove substantially more fruitful. Second was the section on Economic Development and Reconstruction in the Charter for an International Trade Organization. Here, under pressure to settle trade problems, the conference delegates reached a draft agreement also on investment, but at the cost of compromises and deficiencies that rendered the result markedly short of satisfactory;[39] and this Charter has now been abandoned in favor of an instrument confined exclusively to commercial matters, the General Agreement on Tariffs and Trade, the subject on which a viable meeting of minds proved possible owing to the existence of a community of reciprocal interests in the pro-

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[38] League of Nations doc. C. 97. M.23. 1930. II reports the proceedings of the conference, and C. 174. M.53. 1928. II. 14, the draft text of a convention, with explanations, which was before it for consideration. For a brief appraisal of the outcome, see Potter, "International Legislation on the Treatment of Foreigners," 24 Am. J. Int. Law (1930) 748–51; for a more detailed account, Cutler, "The Treatment of Foreigners in Relation to the Draft Convention and Conference of 1929," 27 *ibid.* (1933) 224–46.

[39] Final Act and Related Documents of the United Nations Conference on Trade and Employment (Havana, 1948), especially Article 12. On businessmen's objections to the Charter's investment section, see Diebold, The End of the I.T.O. (Princeton, Essays in International Finance, No. 16, October 1952), pp. 18–19.

motion of international trade. Third was the 1948 inter-American conference at Bogota, which attempted a general economic agreement. The eventuating draft was vitiated by exceptions and, after a renewed attempt at the Pan-American Union in Washington in 1949 to reconcile differences, the project was dropped.[40]

The cause of these failures would seem to be an inherent one. An investment convention, to be worth-while, must embody firm reassurances to the alien, to private capital, and to private business. Since multilateral undertakings tend to a least-common-denominator position, an effective investment document presupposes a high level of international consensus concerning the sanctity of private property, the advantages of private enterprise, and the acceptability of alien participation in the country's economy; it presupposes also a shared incentive to encourage and protect the foreigner and his capital. This basic international community of attitude, will, and interest patently is nonexistent in the present state of affairs, and its development is not aided by the fact that investment questions are susceptible of being regarded as touching upon sensitive issues of domestic sovereignty, internal economic policy, and national political philosophy.

Even to the extent that an adequate avowed consensus can be found *en principe*, many persistent divergences arise over details, owing to variances in national legal systems and in the provisions of legislation. Whether such details be great or small in significance, their number can accumulate into a massive total in connection with a far-reaching instrument of multiple aspects such as an investment convention, in the setting of a large and variegated gathering.[41] All must somehow be reconciled before the objective of exact texts can be reached; the process of reconciliation can be virtually interminable, and the end, if not frustration, can as likely be an array of compromises, reservations, and equivocations tantamount

[40] For text see "Economic Agreement of Bogota" (9th Int. Conf. of American States) issued by the Pan American Union (Washington, 1948); and for an indication of the divergencies which finally prevented consummation of the agreement, see report of the Special Commission on Reservations concerning the Economic Agreement of Bogota (Pan American Union, Washington, July 13, 1949, Spanish original).

[41] The difficulty faced in finding general accord on a single small segment of a total investment agreement is illuminated, for example, in Professor Nussbaum's analysis of experience with the Geneva instruments of 1923 and 1927 on commercial arbitration, "Treaties on Commercial Arbitration," 56 Harvard L.R. (1942) 219 *et seq.* Similarly, as to the problem of an acceptable rule on the nationality of corporations, see 1927 Report of the League of Nations Committee of Experts on the "Nationality of Commercial Corporations and their Diplomatic Protection," 22 Am Jour. Int. Law, Spec. Supp. (1928) 171, 177–78; and Voelkel, "A Comparative-Study of the Laws of Latin America Governing Foreign Business Corporations," 14 Tulane L. R. (1939) 42, 68–70.

to frustration. The reaching of satisfactory results is not helped by the phenomenon that a country which may be quite willing to profess sympathy for the foreign private investor, and may indeed in practice actually accord him fair treatment, may nevertheless be less than eager to bind itself internationally to do so, whether because of domestic political complications or otherwise. Finally, what a country may be willing to undertake on a selective bilateral basis may be considerably different from the engagements it is prepared to assume indiscriminately vis-à-vis all the world.

The production attained so far in the current FCN treaty program of the United States Government, under which this government has consistently over the past ten years stood ready and desirous of negotiating with each and every like-minded country at the latter's convenience, may be taken to betoken the difficulties implicit in multilateralism in the field of investment. The total to date is signed treaties with fifteen scattered countries, a number of them not yet in force. While they are all of a type, and are all interlinked by a common bond of principle and foundation substance, they are otherwise rather kaleidoscopic in variety—in their superstructural content, their reservations and exceptions, their organization, style and wording, their shades of emphasis, their date of signature, the rate and duration of their negotiation, and the time required to effectuate ratification.[42] Each of these instruments reflects presumably a mutually satisfactory regulation of paired interests and bilateral relationships. But it is not easy to visualize just how they might be amalgamated into a composite unit which would reflect an equally satisfactory fusing of plurilateral relationships and an equally viable pooling of multiple interests. On a single important investment question, national treatment for business enterprise, for example, the whole is conspicuously less than the sum of its parts, owing to the variations in the exceptions and the approach to "screening";[43] and the variations

[42] For range of conspicuous difference compare, for example, the voluminous China treaty of 1946 with the compact Ethiopia treaty of 1951; the German treaty of 1954, which contains a Protocol with 24 paragraphs of clarification and adjustment, with the Greek treaty of 1951, which has none, but which in turn is quite differently organized from others of its contemporaries. The total time required, from the first steps to signature, has ranged from 18 months to 8 years, in the case of the fifteen treaties so far completed since 1946; the Irish treaty of 1950 came into force within eight months of signature, but the Uruguay treaty of 1949 is still unperfected. A detailed tabulation of all the variances, treaty from treaty, aside from those of an inconsequential verbal character, would require more space than the present article occupies.

[43] By this is meant the qualifications which are placed on the extent to which national treatment is assured with respect to initiating an investment in ordinary commercial and industrial enterprises, an objective sought wherever possible in the U.S. treaty proposals.

otherwise in content suggest that what appeals to one country does not necessarily appeal to another. It is not easy to visualize, either, how a collective negotiation, bracketed within the Procrustean confines of a scheduled conference, could bid to produce equal results among the countries concerned, much less among the far larger number of countries which would be expected to participate.

Conversely, these treaties illustrate also the feasibilities of bilateralism: the case-by-case approach, marked by flexibility in timing, in length of deliberation, and in the peripheral adjustments needed to take account of individual national circumstances and to achieve an agreeable balance of reciprocal advantage. They likewise illustrate the feasibility of the broad-gauged FCN treaty, as compared with the specialized, uni-purpose "investment" agreement. The former has an accordion-like quality. It can be of variable scope; and, so long as it contains the basic investment-interest content, it can be shortened or lengthened to suit the desires and needs of each country. That none of the treaties so far signed actually has been pared down to its investment hard-core, or anywhere near so, evidently signifies that countries willing to entertain the subject are very apt to choose to do so in the framework of a comprehensive settlement of their relations with the United States.

An FCN treaty in its fully realized form is a house of many mansions, concerned with all citizens and their interests, great and small, and whether or not of an economic nature; it is implicitly concerned also, in a major way, with the intangibles of good will between nations in their everyday relations. Although the United States may now in general be motivated primarily by investment considerations in seeking such treaties, the other side may share this motivation only to a secondary extent. For example, the preambles to the treaties with Japan and Germany, in summarizing the general purposes in view, list the promotion of commercial intercourse ahead of the encouragement of investment, and the treaty with Ethiopia lays particular stress on peace, friendship, and good diplomatic relations. Again, while conclusion of a treaty means perforce that both sides concur on the mutual desirability of investment provisions, in the case of a country having little or no capital to export the

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The treaties with Ethiopia and Iran, for example, altogether lack a national treatment rule concerning this phase of the investment process; the rule in the treaty with China is an imprecise "adhering generally to the principle" (Art. III, par. 3), in the case of corporate investments; the treaty with Ireland contains a reservation for that country's Control of Manufactures Act (Art. VI, par. 4 and the Minute of Interpretation applicable thereto); and those with Denmark, Japan, Germany, and the Netherlands in their respective Protocols contain limited reservations framed in balance-of-payments terms.

legal rights vouchsafed investors can appear on their face to constitute a lopsided bargain unless balanced by rights utilizable in actual practice by that country's own citizens. Provisions on such matters as visa rights for merchants, and rights for citizens of humble station to work in the common occupations and enjoy workmen's compensation and social security benefits, can thus assume material significance in the process of reaching a meeting of minds on purely "investment" questions.

Difficulty, moreover, is encountered in trying to identify only certain provisions as "investment provisions" and segregate them into a separate, self-contained packet. The building and operation of a motor factory by a big corporation clearly is "investment" in its major "economic development" connotation; but how can and why should treaty protection be written that does not cover also, at the other end of the business scale, the individual entrepreneur engaged in a sales activity? Investors, *inter alia*, are interested in treaty provisions regarding lawful protection for their rights, and access to the courts of justice, familiar subject-matter for FCN treaties; but why should the benefits of such provisions be confined to only those persons classed as "investors," even assuming that an acceptable treaty definition of "investor" could be devised? Fundamental personal rights, such as freedom of conscience and humane treatment from policemen and jailors, do not fall under the "investment" heading; but can the investor be considered properly protected unless such traditional FCN treaty rights are assured him? Even the navigation and trade provisions of the treaty, for that matter, are not without an investment bearing. On the one hand, trade and shipping entail capital outlays ("investment") and, on the other, investors going into a foreign country usually have an interest in importing equipment and supplies and in utilizing maritime transportation.

In a real sense, therefore, the FCN treaty as a whole *is* an investment treaty; not a mosaic which merely contains discrete investment segments. It regards and treats investment as a process inextricably woven into the fabric of human affairs generally; and its premise is that investment is inadequately dealt with unless set in the total "climate" in which it is to exist. A specialized "investment agreement" based on a narrower premise would be to that extent unrealistic and inadequate. This is by no means to say that special agreements dealing with fragments of the investment complex do not have their place. In fact, the United States has underway programs for the negotiation of at least two kinds of such special-purpose agreements. One is the double-tax convention, which deals specifically with the highly important subject of taxation, in a detailed and technical way which is impracticable in a

general treaty of the FCN type.[44] The other is the so-called investment guaranty agreement, an arrangement of a derivative administrative character designed to protect the interests of the United States Government when acting as insurer under the "investment guaranty" program provided for in a recent Act of Congress.[45] Neither is designed to replace or substitute for the general FCN treaty; each, rather, reinforces and supplements the other.

IV

The factors which cause foreign investments to be made or not to be made are varied and numerous, and include those of a political, economic, social, and environmental nature which are beyond the reach of treaties. A treaty is a legal instrument, dealing with rules of law; in turn, the extent to which a treaty can practicably deal even with legal conditions is limited. It can purport to assure that a country's laws and regulations will be nondiscriminatory in content and even-handed in their administration; but this is no guarantee that the legal regime, even though scrupulously nondiscriminatory, will in its details appear tolerable or attractive in the eyes of the entrepreneur who alone can decide whether capital will actually be ventured. A forbidding tax may be no less forbidding because it falls on everyone alike.

Limitations on the possibilities of the treaty device would appear to follow implicitly also from the idea of sovereign equality of nations, which governs interstate relations in the modern era. Treaties cannot be

[44] Conventions for the avoidance of double taxation with respect to taxes on income have been concluded with 18 countries so far ("List of Treaties and Other Agreements Concluded between the United States of America and Other Countries Relating to Double Taxation," Department of State, Office of Legal Adviser, March 15, 1956). For discussion of the program, see, e.g., Gilpin and Wells, "International Double Taxation of Income: Its Problems and Remedies," 28 Taxes (C.C.H., Chicago) (1950) 9–32; Kanter, "United States Income Tax Treaty Program," 7 National Tax Jour. (1954) 69–88; and address by Eldon King (Dir., Internat'l Tax Relations Division, IRS, United States Treasury Department), "The Income Tax Conventions with Germany and Japan, and Prospective Conventions with Latin America," delivered before the International Fiscal Association, New York, May 6, 1955.

[45] The present statutory provision, which stems from the Marshall Plan legislation of 1948, is sec. 413(b) of the Mutual Security Act of 1954 (P.L. 665, 83rd Cong.), and provides for insurance against convertibility or expropriation risks, or both, upon payment of a stipulated premium, for qualified new American investments approved by both Governments. As of May 1, 1956, the necessary covering agreements had been made with 26 countries as to both types of insurance, and with 4 others as to convertibility insurance only. As of that date, approximately $106,000,000 of insurance was outstanding under the program. Information on the program may be found in the "Investment Insurance Manual" issued by the Foreign Operations Administration (Washington, Oct. 1954); and in a recent staff report of the House Committee on Foreign Affairs (Investment and Informational Media Guaranties and the Mutual Security Program, Committee Print, May 1, 1956).

negotiated faster than each country is of a mind to negotiate; nor can they be negotiated at all except as each feels that its national interests will thereby be served. The eventuating agreements, being free-will, must consequently be reciprocal and innocent of special privilege. It is therefore hardly to be expected that another nation will wish to bind itself more tightly than the United States conversely is willing to be bound, at both federal and state levels; at least, unless persuasive and acceptable *quid pro quos* are given. But whether extraneous bargaining power (such as government loans, grants, tariff concessions) may feasibly be used to obtain treaty commitments is quite doubtful. Insofar as unilateral guarantees were sought, going beyond the norm of national treatment, the spectre of extraterritoriality would arise; and there at least would be an implication that commitments which the United States did not consider fit and proper to assume, for its part, were nonetheless fit and proper for someone else. Such a course, in any event, would suggest that the rules which ought to prevail are not matters of right principle in the common good, as should be the premise of an investment arrangement, but are rather mere matters of private advantage and profit, suited to the haggling of the market place. It would presuppose, finally, that the national security considerations and other high policy purposes now actuating United States programs for assisting other nations should be subordinated to the objective of inducing them to accept American private capital.

In sum, the limits of an investment treaty are set by the degree to which the United States is willing to bind its own domestic policy and to waive the alien disabilities actually or potentially present in federal and state statutes. Thus, for example, such a strong investor-interest provision as one forbidding nationalization of private enterprise, or stipulating that expropriation may occur only if the compensation has been agreed upon and paid in advance, is not possible so long as the United States is unprepared to undertake such a predetermined restriction upon its own power of eminent domain. Further limits, in turn, are set in each case by the reservations which the foreign country concerned deems requisite for reasons of its own public policy, a circumstance which accounts in considerable measure for the variations among the several treaties so far signed. Their array of differences in the approach to "screening," for example, reflects the differing degrees to which different countries may insist that the "open door" principle, traditionally favored by the United States, be qualified by retention of the government's right to determine the acceptability of foreign investments on a case-by-case basis.

The treaties developed for promotion and protection of foreign investment thus remain, despite the many improvements effected in them as compared with earlier treaties, essentially moderate in their content and purport. However, moderation is not synonymous with ineffectiveness. These treaties focus, in fundamental terms of enduring value over the long range, upon the line between policy favorable and policy unfavorable to foreign investment: namely, hospitality to and equality for the foreigner under the law, and respect for his person and his property. When this exists, the foundation exists; and perhaps the most effective role which treaties are capable of playing is in the laying of a sound and stable foundation. This fundamental role consists partly, but only partly, in the legal commitments which the document contains. Equally it consists in the general attitude which a country's willingness to assume these formal engagements signifies. These treaties are above all treaties of "friendship," as their title indicates; and their conclusion is evidence of a friendly disposition, an intangible which may be quite as important to the investor as the letter of his legal rights.

Comments

RECOGNITION OF FOREIGN MONEY JUDGMENTS IN FRANCE

From *Hilton v. Guyot*[1] the American lawyer knows of the French rule denying conclusive effect to foreign money judgments, even when the jurisdiction of the foreign court in the case is not questioned. In exequatur proceedings for the enforcement of foreign in personam judgments,[2] French courts assert the right to a ***révision au fond***, a review of the adjucated issues as respects both facts and law. After the Napoleonic codification, the French Court of Cassation so ruled as early as 1819 in the leading case *Holker v. Parker*[3] and has accordingly ruled ever since,[4] notwithstanding growing opposition of the textwriters[5] to the doctrine of unlimited review which goes back to a Royal Decree of 1629[6] and custom.[7]

In *Charr v. Hasim Ulusahim*,[8] decided on October 21, 1955, the Paris Court of Appeals has thrown the old doctrine overboard. Not bound by the principle of stare decisis, the Court, in an elaborate opinion, termed the theory of unlimited review an error and gave conclusive effect to the foreign judgment to be enforced. The *Charr* decision may make history, as *Johnston v. Compagnie*

[1] 159 U.S. 113 (1895); 23 Journal du Droit International (1896) 677.

[2] No new action on the judgment need be brought. The foreign judgment as such may be enforced after grant of an exequatur by a French court. See Lorenzen, "French Rules of the Conflict of Laws," 36 Yale L. J. (1927) 731, 750; Delaume, American-French Private International Law (1953) 59.

[3] Holker v. Parker, Cour de Cass. (Ch. civ.), April 19, 1819, [1819] Sirey Jurisprudence [hereafter S.] I. 288.

[4] E.g., Chemins de Fer Portugais v. Ash, Cour de Cass. (Ch. Civ.), March 22, 1944, [1945] S. I, 77; Noted by Nadelmann, 61 Harv. L. Rev. (1948) 804; Slawouski v. Pelleterie de Roubaix, Cour de Cass. (Ch. Req.), June 29, 1933, [1933] S. I. 307; Scaramanga v. Bénard, Cour de Cass. (Ch. Civ.), Dec. 9, 1903, [1909] S. I. 267; Hess v. Lafon, Cour de Cass. (Ch. Civ.), Jan. 14, 1901, [1901] S. I. 128.

[5] 2 Pillet, Traité pratique de Droit International Privé (1924) 705; 1 Bartin, Principes de Droit International Privé (1930) 596; 6 (2) Niboyet, Traité de Droit International Privé Français (1950) 119; Batiffol, Traité élémentaire de Droit International Privé (2d ed. 1955) 849; Lerebours-Pigeonnière, Précis de Droit International Privé (6th ed. 1954) 330.

[6] Ordinance of June 15, 1629, art. 121: "Judgments rendered, contracts or obligations recognized, in foreign kingdoms and sovereignties, for any cause whatever, shall have no lien or execution in our kingdom. Thus the contracts shall stand for simple promises; and, notwithstanding the judgments, our subjects against whom they have been rendered may litigate their rights anew before our judges." See Lainé, "Considérations sur l'exécution forcée des jugements étrangers," 33 Revue Critique de Législation et de Jurisprudence (N.S. 1904) 147.

[7] See legal opinion by seven members of the Paris Bar, dated Oct. 15, 1664, 6 Hollandsche Consultatien 657 (1666), in Henry, Judgment of the Court of Demerara, in the Case of Odwin v. Forbes, Appendix B, 209 (1823). Lainé, *op. cit. supra* note 6, 32 *id.* (1903) 533.

[8] Paris Ct. of App. (1st Ch.), [1956] Recueils Dalloz et Sirey, Jurisprudence 61, with note by Francescakis, (1956) Juris Classeur Juridique II. No. 9047, with note by Motulsky, 44 Revue Critique de Droit International Privé (1956) 769, with note by Batiffol.

Générale Transatlantique[9] did thirty years ago when the highest court of the State of New York decided to recognize the effect of a French judgment, notwithstanding the ruling—a five to four decision—of the United States Supreme Court in *Hilton v. Guyot* making existence of reciprocity a condition for recognition.

The *Charr* case involved enforcement proceedings for a money judgment rendered by a court in Istanbul against a defendant then a resident of Istanbul[10] and not a French national,[11] sued in connection with facts governed by Turkish law.[12] Contrary to what the Paris court of first instance had done, the Paris Court of Appeals denied the defendant the right to have the merits of the Istanbul court decision reviewed in the enforcement proceedings. In justification of the denial of the right of full review, the Court made a series of observations which may be summarized as follows:

Notice is taken of the unanimous opposition of the textwriters in France to the theory of unlimited review. Reference is made to the absence of any statutory text granting or imposing such a right, which, the Court says, among civilized nations only Belgian and French courts assert. The argument is made that, provisionally at least, the right of review reduces the international value of judgments to nothing. Forcing the plaintiff to run the risk of a new law suit, it is observed, is contrary to the requirements of international legal cooperation. The theory of review is termed an anachronism going back to a time when knowledge about the extent to which review is needed was vague. But today, it is said, jurisdictional and other requirements have been fully developed in French law, and the need for a general right of review has ceased to exist. The Court points out that, for these reasons, the French courts have abandoned the right of general review for foreign judgments on questions of status; it has been given up in a series of conventions with other nations; and it was not incorporated in the legislation for the Protectorate of Morocco. Passing to the practical reasons which militate against full review, the Court points to the undesirable task of acting as a sort of court of review over the domestic application and interpretation of foreign law (when the case is governed by foreign law) and often of having to assess circumstances and facts which may have occurred in foreign and, possibly, unfamiliar surroundings.

[9] 242 N.Y. 381, 152 N.E. 121 (1926); 54 Journal du Droit International (1927) 196.

[10] He had, in addition, submitted to the jurisdiction.

[11] Had he then been a French national, he might have been able to invoke the exclusive jurisdiction of the French courts under Article 15 of the French Civil Code. See Nadelmann and von Mehren, "Codification of French Conflicts Law," 1 Am. J. Comp. L. (1952) 404, 414; Delaume, *loc. cit. supra* note 2, at 56.

[12] The prevailing view in France is that a foreign judgment will not be recognized if the court applied foreign law not applicable under the French conflicts rules. Batiffol, *op. cit. supra* note 5, 844; Draft Law on Private International Law, art. 104 (2), 1 Am. J. Comp. L. (1952) 416, 430. But see Holleaux, "Book Review," 44 Revue Critique de Droit International Privé (1955) 832, 835; Holleaux, "Report," Comité Français de Droit International Privé, La Codification du Droit International Privé (1956) 219, 232; Louis-Lucas, "Note," (1956) Juris-Classeur Périodique II. No. 9223.

Today, these views, forcefully expressed in the opinion, have become more or less commonplace among the specialists. It remains to be seen whether the French Court of Cassation will follow suit if it has occasion to consider the case. The Court could fall back on a finding, added as "surplus" by the Court of Appeals in its opinion, that the examination of the Istanbul court decision by the lower court confirms the propriety of the Istanbul decision. But the French Court of Cassation recently has not hesitated to depart from long-established conflicts rulings. The most important instance is the decision in the *Rivière*[13] case, where it was decided that, notwithstanding the rule of French law that status is controlled by the national law, the validity of a foreign divorce decree is governed by the law of the matrimonial domicile when the spouses are of different nationality.[14]

Whether the *Charr* decision was unanimous cannot be known because dissents are not announced in France. But it is, we think, pertinent to observe that the First Chamber of the Paris Court of Appeals, which rendered the decision, was presided over by a well-known authority on private international law.[15] And it is interesting that in the seemingly only other instance where a higher French court did not follow the rule of unlimited review—a decision of 1866 of the Paris Court of Appeals[16]—the great internationalist and authority on commerical law, Massé,[17] presided.

While, after 1866, the French courts in general were not ready to follow this lead, recent developments in matters of conflict of laws seem to indicate that the climate has definitely changed. The new Draft Law on Private International Law prepared by the Commission for the Reform of the French Civil Code,[18] currently submitted to the courts of appeals and the law faculties for their observations, codifies the rule that the courts shall have the right to verify whether the case was properly decided by the foreign court as respects

[13] Rivière v. Roumiantzeff, Cour de Cass. (Ch. Civ., Sec. Civ.), April 17, 1953, [1953] S. I. 181, 80 Journal du Droit International 861 (English trans.); Lewandowski v. Lewandowski, Cour de Cass. (Ch. Civ., 1st Sec. Civ.), March 15, 1955, [1955] Recueils Dalloz et Sirey I. 540, 44 Revue Critique de Droit International Privé (1955) 320. Batiffol, "Recognition in France of Foreign Decrees Divorcing Spouses of Different Nationality," 4 Am. J. Comp. L. (1955) 574.

[14] In Belgium, on the contrary, in order to be recognized, the divorce must be valid under the national law of both spouses. Procureur Général à Bruxelles v. Servais and Rossi, Cour de Cass. (Ch. réunies), Febr. 16, 1955, [1955] Pasicrisie Belge I. 647, 44 Revue Critique de Droit International Privé (1955) 143.

[15] President Judge Holleaux. See, notably, "Holleaux, Remarques sur l'évolution de la jurisprudence en matière de reconnaissance des décisions étrangères d'état et de capacité," 9–13 Travaux du Comité Français de Droit International Privé (1952) 182; Holleaux, Book Review [Süss, Die Anerkennung ausländischer Urteile], 41 Revue Critique de Droit International Privé (1952) 187, 188.

[16] Rottenstein v. Asch, Paris Ct. of App. (5th Ch.), Febr. 23, 1866, [1866] II. 300.

[17] See 2 Massé, Le Droit Commerical dans ses Rapports avec le Droit des Gens et le Droit Civil (3d ed. 1874) 71.

[18] Commission de Réforme du Code Civil, Avant-Projet de Code Civil 215 (1955). See Nadelmann and von Mehren, *loc. cit. supra* note 11, at 416.

the facts and the applicable law.[19] Influenced by the late Professor Niboyet,[20] it goes even further, establishing as it does the requirement of reciprocity,[21] which is not now part of French law and never was.[22] This Draft Law was considered by the French Committee on Private International Law, an association including the leading French conflicts specialists, at a special two days meeting held in Paris in May, 1955.[23] The rule of full review in the Draft Law, as well as the innovation, were rejected unanimously by those present.[23a]

To American lawyers, the remark in the *Charr* opinion about the lack of experience with the problems of and conditions for recognition at the time of the first ruling in favor of full review is of special interest. For the same consideration played a similar role in this country in the history of the application of the clause in the Constitution of the United States which provides that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.[24] It will be recalled that, until the Supreme Court of the United States settled the question in 1813 in *Mills v. Duryee*,[25] notwithstanding the clause in the Constitution and the Act of Congress of 1790,[26] courts in New York[27] and Massachusetts,[28] among others, had refused to grant conclusive effect even to judgments of courts from sister states. And one of the principal reasons for this attitude was the concern about judgments coming from courts which had no jurisdiction or where jurisdiction was asserted against nonresidents by way of local attachment. In his dissent in the *Mills* case,[29] Justice Johnson specifically made this argument, and he

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[19] Draft Code art. 136 (5) (Art. 104 (5) of the Draft Law).

[20] "The ardent manner in which Mr. Niboyet defended his personal views on these points won the adherence of the Commission. The Government will have to judge whether our texts, which are based upon the consideration of national interests, are of a nature that would impede the present movement in favor of a broader conception." Julliot de la Morandière, Preliminary Report of the Civil Code Reform Commission of France (Dainow trans.), 16 La. L. Rev. (1955) 1, 31.

[21] Draft Code art. 137 (Art. 105 of the Draft Law), *loc. cit. supra* note 19.

[22] In the discussion of the draft in the Commission, Professor Niboyet had referred to American law: "Certain important countries do not execute foreign judgments; the United States, for example. The foreign judgment constitutes a fact which may serve as a basis for an action to be brought here, but they do not execute a foreign judgment." See Nadelmann, "Reprisals Against American Judgments?," 65 Harv. L. Rev. (1952) 1184, 1186.

[23] Comité Français de Droit International Privé, La Codification du Droit International Privé (1956), summarized in 44 Revue Critique de Droit International Privé (1955) 369.

[23a] Comité Français de Droit International Privé, *op. cit. supra*, note 23, at 297 (Resolutions on Art. 136 (5) and 137 of the Draft Code). See Holleaux, Report," *id.* at 219, 231–234.

[24] U. S. Const. art. IV, §1.

[25] 7 Cranch 481 (U. S. 1813).

[26] "And the said records and judicial proceedings . . . authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken." Act of May 26, 1790, 1 Stat. 93.

[27] Hitchcock v. Aicken, 1 Cai. R. 460 (1803), being the first case.

[28] Bartlett v. Knight, 1 Mass. 401, 2 Am. Dec. 36 (1805), being the first case.

[29] 7 Cranch 481, 486 (U. S. March 11, 1813).

referred, as an illustration, to a case decided by the Supreme Court earlier that term, *Holker v. Parker*,[30] where it appeared that a judgment for $150,000 was given in Pennsylvania upon an attachment levied on a cask of wine and action of debt brought on that judgment in Massachusetts. It so happens that the parties in that case were the same as in the leading French case, *Holker v. Parker*,[31] decided by the Court of Cassation in 1819. Only much later, when the jurisdictional requirements for the grant of full faith and credit to judgments of courts of sister states, as well as the admitted defenses, had been clarified by Supreme Court rulings,[32] did the courts in the United States begin to grant, under similar conditions broadly speaking, conclusive effect also to judgments of courts of foreign nations.[33] The development in England was similar. Only gradually in the course of the last century,[34] did the English courts begin to disregard *Walker v. Witter*,[35] decided in 1778, which influenced also American courts,[36] in which Lord Mansfield had indicated, referring, among others, to a decision in a Scottish case,[37] that foreign judgments are mere prima facie evidence of the debt and not conclusive on the merits.

The case in the French Court of Cassation, *Holker v. Parker*, was decided on April 19, 1819. This case involved former partners of Daniel Parker & Co., which was established in the United States about 1782 and became insolvent after a few years.[38] The French suit was a late phase of a protracted litigation,

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[30] 7 Cranch 436, 452 (U. S. March 10, 1813).

[31] [1819] S. I. 288.

[32] By, notably, D'Arcy v. Ketchum, 11 How. 165 (U.S. 1850) (requirement of service), and Pennoyer v. Neff, 95 U.S. 714 (1877) (quasi in rem jurisdiction).

[33] As of 1894, the case law is discussed in Hilton v. Guyot, 159 U.S. 113, 194 (U.S. 1894), where reference is made to Lazier v. Wescott, 26 N.Y. 146, 150 (1862); Dunstan v. Higgins, 138 N.Y. 70, 74 (1893); Rankin v. Goddard, 54 Me 28 (1866); Baker v. Palmer, 83 Ill. 568 (1876). Current law is discussed in Reese, "Status in This Country of Judgments Rendered Abroad," 50 Col. L. Rev. (1950) 783. Codification, by way of uniform legislation, has been suggested in Nadelmann, "The United States of America and Agreements on Reciprocal Enforcement of Foreign Judgments," 1 Nederlands Tijdschrift voor Internationaal Recht (1953/54) 156, 4 Revista de la Facultad de Derecho de Mexico, No. 14, (1954) 47.

[34] See Westlake, Private International Law (2d ed. 1880) 311; Graveson, Conflict of Laws (3d ed. 1955) 463. The law is codified in the Foreign Judgments (Reciprocal Enforcement) Act, 1933. See Dicey, Conflict of Laws (6th ed. 1949) 420; Read, Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth (1938) 299; Yntema, "The Enforcement of Foreign Judgments in Anglo-American Law," 33 Mich. L. Rev. (1935) 1129, *Id.* "General Report," 2 Mémoires de l'Académie Internationale de Droit Comparé (1932) 348.

[35] 1 Dougl. 1, 99 Eng. Rep. 1 (K.B. 1778).

[36] See, e.g., James v. Allen, 1 Dall. 188, 190 (C.P. D. Phila. 1786); Phelps v. Holker, 1 Dall. 261 (Sup. Ct. Pa. 1788), for early cases.

[37] Sinclair v. Fraser, 6 Morison, Dictionary of Decisions 4542 (H.L. 1771). *Cf.* Kames, Principles of Equity (2d ed. 1767) 370.

[38] See Holker v. Parker, 7 Cranch 436 (U.S. 1813). The firm, Parker, William Duer, and John Holker, had substantial procurement contracts with the U.S. army, Holker financing the contracts. Holker previously had been French consul in Philadelphia and procurement agent of the French navy. See 11 Journals of the Continental Congress 695, 713 (1908); Davis, Essays in the Early History of American Corporations (1917) 122.

here and in France, in which Holker tried to recover from Parker, who had absconded to France in 1784, the latter's share in the partnership debts which Holker had been made to pay.[39] A first and defective judgment against Parker rendered by the Circuit Court for the District of Massachusetts in 1799 had to be reopened through proceedings in equity[40] leading to the United States Supreme Court decision of 1813.[41] Holker obtained from the Circuit Court a new judgment for more than $500,000 in May, 1814, and this judgment was presented to the Paris court of first instance with the request for an exequatur allowing enforcement of the judgment in France. Parker argued that he had appealed and that the judgment had no conclusive effect.[42] The court ordered execution, but only to protect the claim, giving Parker four months to prove the appeal and to show that the appeal suspended execution.[43] This decision was reversed by the Court of Appeals which held that foreign judgments have no conclusive effect and that Holker had to prove his claim.[44] By judgment of April 19, 1819, the French Court of Cassation confirmed this decision.[45] From the published report, it appears that Parker had referred to the fact that, in England and the United States, conclusive effect was denied to foreign judgments.[46] Holker urged that, although judgments against French nationals were held to be subject to review, the same rule should not be applied in the case of judgments against foreigners. However, the Court of Cassation found no basis to admit such a distinction in the law. According to the Court, permission to enforce a foreign judgment in France could be given only after full review of the case.

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[39] See Holker v. Parker, 7 Cranch 436 (U.S. 1813). *Cf.* Ex parte Holker, 2 Dall. 111 (Pa. Sup. Ct. 1790).

[40] While Holker was in prison in Philadelphia for debt, his lawyer in Boston consented to a judgment against Parker for a mere $5000 in settlement of the accounts. Parker invoked this judgment after an arbitration agreement made by the parties in Paris in 1800. The Paris Court of Appeals ruled in 1803 that Holker had to seek relief in the courts in the United States. See Holker v. Parker, [1816] S. II. 369. The bill of equity in the U.S. Circuit Court was argued for Holker by Joseph Story. Oct. Term 1811, No. 13, 3 C. C. D. Mass. Docket (1809–1812). Story, J., did not sit in the case when it came before the Supreme Court. Minutes of the U. S. Sup. Ct., Febr. 26, 1813 (B: 1806–1817).

[41] 7 Cranch 436 (U.S. 1813).

[42] In Swan and Schweizer v. Parker, Cour de Cass. (Ch. Civ.), Nov. 30, 1814, [1815] S. I. 186, confirming Paris Ct. of App., June 11, 1812, [1812] S. II. 398, Parker had argued, unsuccessfully, that, although resident for almost thirty years and an owner of real estate in France, he was not subject to the jurisdiction of the French courts in proceedings brought by foreigners. But he used the French courts in Parker v. Rapp, Cour de Cass. (Ch. Req.), July 16, 1828, [1829] S. I. 112 (*cause célèbre* involving a questionable deal by General Rapp).

[43] Civ. Trib. of the Seine, Aug. 27, 1815, [1816] S. II. 369.

[44] Paris Ct. of App., Aug. 27, 1816, [1816] S. II. 369, 371.

[45] Holker v. Parker, Cour de Cass. (Ch. Civ.), April 19, 1819, [1819] S. I. 288, 290. 4 Merlin, Questions de Droit (3d ed. 1820) 30 (under "Jugement" §14, II). The facts of the case, including the Court of Appeals decision, are given in Hilton v. Guyot, 159 U.S. 113, 215 (1894).

[46] "For us, French, the foreign courts have no authority and their judgments, consequently, are without effect, in the same way as the judgments of French courts are without effect in foreign countries. This is the established rule, especially in the United States and in England". Counsel for Parker, [1819] S. I. 288 (our trans.).

The decision of the French Court of Cassation in *Holker v. Parker* became well-known in this country. Relying on a report of the case in Merlin's *Questions de Droit*[47] and on a discussion in Toullier's treatise on the Code,[48] Chancellor Kent referred to it in the first, 1827, edition and the following editions of his Commentaries on American Law.[49] Summarizing the status of French law on the subject, he commented: "[I]t is surprising to observe the very little respect or comity which has hitherto been afforded to the judicial decisions of foreign nations in so enlightened, so polished, and so commercial a country as France."[50] Considering the unsettled status of the law on the subject in the United States, this is a harsh comment, especially from a quarter which once supported[51] the doctrine of *Walker v. Witter*.[52] But this is past history, and the time has no doubt come to apply to foreign court decisions satisfying the requirements of jurisdiction "the true spirit of international comity" to which Kent referred in this context in later editions[53] and to which reference is made by the Paris Court of Appeals in the *Charr* opinion.

The French ruling in *Holker v. Parker* is discussed, together with the facts of the case, in the majority opinion in *Hilton v. Guyot*[54]—incidentally an exhibition of comparative law research in conflict of laws seldom encountered in supreme court opinions. Perhaps without *Holker v. Parker*, there would never have been an *Hilton v. Guyot*—a case which has produced abroad more confusion and comment[55] than any other American conflicts decision and has been the center of much domestic discussion. Still today, uninitiated foreigners are found to assume that, because of the Supreme Court decision in *Hilton v. Guyot*, reciprocity is a requirement for recognition of foreign judgments in the United States, even though *Hilton v. Guyot* never bound the courts of the States[56] and, since *Erie R.R. Co. v. Tompkins*,[57] probably is no longer authority for the lower federal courts.[58] But formal overruling of *Hilton v. Guyot*, should

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[47] 4 Merlin, Questions de Droit (3d ed. 1820) 30 (under "Jugement" §14, II).

[48] 10 Toullier, Droit Civil Français suivant l'Ordre du Code (4th ed. 1824) 132.

[49] 2 Kent, Commentaries on American Law 104 n. (1827); 2 Kent, *op. cit.*, *123 n.

[50] At 103 note (d) of the first edition, at *121 note (d) of the subsequent editions.

[51] Kent, J., in Hitchcock v. Aicken, 1 Cai. R. 460, 478, 481 (N.Y. 1803). Explained in Taylor v. Bryden, 8 Johns. R. 173, 177 (N.Y. 1811).

[52] Only in the 4th, 1840, edition of his Commentaries did Kent suggest the grant of conclusive effect, referring to the reasoning in Story's Commentaries on the Conflict of Laws §607 (1834). 2 Kent, *op. cit.*, (1840) *120 n.

[53] 2 Kent, *op. cit.*, *124 n.

[54] 159 U.S. 113, 215 (1894).

[55] See, e.g., the exhaustive discussion at the Academia Mexicana de Jurisprudencia y Legislación in 1895, 2 Sesiones de la Academia (1897) 435 *et seq.*

[56] The case originated in a lower federal court.

[57] 304 U.S. 64 (1938). For a writing in French on the Erie problem, see 2 A. et S. Tunc, Le Système Constitutionnel des Etats-Unis d'Amérique (1954) 411.

[58] Klaxon v. Stenton Electric Mfg. Co., 313 U.S. 484 (1941) (prescribing application of the conflicts rule of the state in which the court sits). See Goodrich, Conflict of Laws (3d ed. 1949) 37; Note, 38 Cornell L. Q. (1953) 423.

the occasion arise, would be as desirable as a ruling by the French Court of Cassation affirming the decision of the Paris Court of Appeals in the *Charr* case.

An error in the *Charr* opinion needs to be noted. Belgium is not the only country besides France where the courts subject foreign judgments to full review. As in Belgium,[59] conclusive effect is denied to foreign money judgments —in varying degrees—in the Netherlands,[60] in Sweden,[61] and in some Swiss Cantons[62] among other European countries. Closer to home, the Code of Civil Procedure of the Province of Quebec provides:[63] "Any defence which was or might have been set up to the original action, may be pleaded to an action brought upon a judgment rendered out of Canada."[64]

In most cases, outdated statutory provisions are responsible for a situation which has been well described by the Paris Court of Appeals in the *Charr* opinion. As so often in conflict of laws, premature codification has hampered the normal development of the law, a lesson which, judging from recent codification ventures,[65] seems to be difficult to accept. But on some points an internationally accepted standard has been reached ready for authoritative restate-

[59] Law on Jurisdiction of March 25, 1876, art. 10. See Poullet, Manuel de Droit International Privé (3d ed. 1947) 627. Not applied to judgments from France, the Netherlands, and Great Britain, with which Belgium has concluded treaties on enforcement of foreign judgments. Poullet, *op. cit.*, 566, 574, 581.

[60] Code of Civil Procedure of 1896 (1838), art. 431 (2). Hooge Raad, April 1, 1938, [1938] Nederlands Jurisprudentie, No. 989. See Kollewijn, American-Dutch Private International Law (1955) 21, where exceptions to the rule are noted. Not applied to judgments from Belgium with which a treaty has been concluded.

[61] Högsta domstolen, July 3, 1913, [1913] Nytt Juridiskt Arkiv I. 326; Dec. 13, 1935, [1935] *id.* 611. See Michaeli, Internationales Privatrecht gemäss schwedischem Recht (1948) 372. Not applied to other Scandinavian countries, due to the Scandinavian Convention of December 2, 1932, on Recognition of Judgments.

[62] E.g., Geneva Code of Civil Procedure of 1920, art. 463 (4) (matter of discretion). See Guldener, Das internationale und interkantonale Zivilprozessrecht der Schweiz (1951) 94; Nussbaum, American-Swiss Private International Law (1951) 33. Switzerland has conventions on recognition of judgments with several countries. Guldener, *op. cit.*

[63] Code of Civil Procedure of 1897, art. 210. Cowans v. Ticonderoga Pulp & Paper Co., 219 App. Div. 120, 219 N.Y.S. 284 (3d Dept., 1927), affirmed 246 N.Y. 603, 159 N.E. 669 (1927). See 2 Johnson, Conflict of Laws (1934) 397; Lafleur, Conflict of Laws in the Province of Quebec (1898) 238. Antecedents: French Ordinance of 1629, art. 121; Law of May 19, 1860, 23 Vict. c. 24, Lower Can. Rev. Stat. c. 90 (1860); 40 Vict. c. 14 (1876), Que. Rev. Stat. §5862 (1888).

[64] Articles 211 and 212 make exceptions for judgments from other Provinces of Canada.

[65] The new French codification draft has met with substantial opposition, on principle, from judges and practitioners. See Comité Français de Droit International Privé, *op. cit. supra* note 23, at 276 *et seq.* The Benelux Convention of 1951 with its Uniform Law on Private International Law, 1 Int'l & Comp. L. Q. (1952) 426, seems to have run into ratification difficulties. The conflicts section 1–105 of the Uniform Commercial Code, enacted in at least one State (Pennsylvania), has been widely attacked. The answer of the Sub-Committee on Article 1, Uniform Commercial Code Supplement No. 1, Jan. 1955, page 91, does not meet the criticism addressed to the application of the new rule to international transactions. *Cf.* Mass. Ann. to the Proposed Uniform Commercial Code (1954) 7.

ment. It is to be hoped, considering the progress made in comparative law research, that the remnants of a past age not in line with the currently accepted standards will disappear. Enough problems remain on other questions[66] to require the full attention of those who work for greater comity.

KURT H. NADELMANN*

[66] See, for example, the claim that the choice of law must remain subject to review even when no public policy is involved, *supra* note 12; or the lack of availability of summary procedures for enforcement of foreign judgments, as in many states of the Union, Nadelmann *loc. cit.*, *supra* note 33. And see the New York Law Revision Commission Report to the Legislature relating to the Uniform Commercial Code (Legislative Document 1956 No. 65(A) 38).

* Board of Editors.

THE DISCREPANCY BETWEEN MARRIAGE LAW AND MORES IN JAPAN[1]

I

Examination of the factors upon which the degree of effectiveness of regulatory legislation depends is one of the major problems of sociology of law. A situation presenting itself well for the purpose of case study is constituted by the marriage legislation of Japan. Japanese society has long been characterized by the so-called family system. Society is conceived as being composed not so much of individuals as of families. The individual is a member of society only through his membership in a family. In the classical form of the family system, each family had its chief, by whom it was represented in its relations with the authorities, with other families, and with the outside world in general, who was responsible for the conduct of all the family members, and who was thus endowed with extensive disciplinary powers over all of them. In this structure, Japanese society was not unlike other societies of the patriarchal type, especially that of ancient Rome, but in Japan the family system was of a particularly elaborate kind and has survived into our own times.

Membership in a family group is determined, of course, by birth, by marriage, and by adoption. By her marriage the female partner leaves the family into which she was born and enters that of her husband. Occasionally, the opposite course would occur, especially when an unmarried woman would be the sole heir in her family. Her intended husband would then be adopted into her family, the continuation of which would thus be secured. Since in every case marriage results in changes of family membership, the transaction is of importance not only for the two individuals but for the two families concerned. Marriage thus appeared as a transaction concluded not so much between the individuals as between their families. It was solemnized by certain traditional

[1] Edited by Max Rheinstein, Max Pam Professor of Comparative Law, University of Chicago Law School.

ceremonies, but in the lower classes it was not uncommon that a marriage was concluded quite unceremoniously by the simple reception of the woman in the family home of the man, and by their factually beginning to live with each other as husband and wife. In those families for which registers of family membership were kept, the new member's name would be recorded on the register, but such registration did not always immediately follow the actual conclusion of the marriage. Although a divorce could as formlessly be arranged by the families concerned as the marriage itself, the deletion from the family register of a woman's name once entered upon it was regarded as a disgrace. Registration was thus frequently delayed until the family head had become convinced that the marriage would be a success.

In the course of the reforms of the 19th century by which Japan was rapidly transformed into a modern nation, it was felt that the lack of any governmental recordation of marriages would not be compatible with the new structure of society. For the determination of marital property rights, rights of support and succession, nationality, and other legal relationships, it is indispensable to know whether or not certain persons are married to each other and, if so, at what dates their marriage relationship was initiated or terminated. With the transformation of Japan from an almost exclusively agricultural to an essentially industrial nation with big cities and large-scale internal migration, family status was no longer so easily recognizable by factual criteria as it had once been. By the Civil Code of 1898,[2] it was therefore provided that no marriage could henceforth be legally concluded except by having it registered by a government official, the registrar of civil status. In contrast to most Western laws, no religious or secular ceremony was required for the conclusion of a marriage, but, in contrast to Japanese custom, the traditional family ceremonies no longer sufficed for the conclusion of a legally valid marriage. If the lawmakers believed that thenceforth all marriages would be registered on the very day at which they were intended by the parties to take effect, it soon turned out that they were mistaken. Custom proved itself too strong to be suddenly uprooted by governmental regulation. Marriages continued to be concluded in the same ways in which they had been concluded before, and the people continued to regard a couple thus living together as being married, irrespective of whether or not there had been any registration. If registration occurred at all, it was frequently delayed until some time after the conclusion of the factual "marriage." Since under the new law divorce had also been made more cumbersome than before by requiring for it the decree of a court, or, in the case of consensual divorce, by requiring at least formal registration, a non-registered factual marriage had the advantage of being terminable in the ancient ways and without any trouble, expense, and publicity. Delay of registration could thus be used to provide in a marriage for a trial period, which would not be terminated by registration until it had become clear to the husband's family that the wife would be a desirable new member, and the wife's

[2] Act of Parliament No. 9, of June 21, 1898.

family had become convinced that its former member would be properly treated in her new family. However, while socially the unregistered marriage was a marriage, i.e. a socially respectable union, it had no such effects within the realm of the law. The children of a merely factual marriage would be illegitimate, there would be no mutual rights of succession, no rights of marital property or support as between the "spouses," and there would be none of the other legal effects of marriage, as they may arise under laws concerning taxation, social security, nationality, etc. Hardships were bound to arise from this discrepancy between the official law and the mores. They have resulted in numerous discussions and proposals of legislative reform. The efforts of the advocates of a return to the pre-Code system, under which the registration of a marriage was not required as an indispensable condition of its legal validity, received new impetus through the present concern about family law, which has been produced by the reforms which Japan had to introduce in 1948 in consequence of the Allied Military Occupation.[3] These reforms, which corresponded to the desires of a considerable part of the liberal groups of Japan, were aimed at the liberation of the individual from the ties of the family system. The adult individual of either sex was to be an independent member of the nation to which he was to stand in a direct relationship rather than the indirect one in which the family constituted the link between the individual and society at large. The authority of the husband over his wife and that of the family chief over all the members of the family were abolished, at least as legal institutions. Obligations of support, which had existed among a wide circle of persons held together by blood relationship or affinity, were limited to the small group of husband, wife, the lineal relations by blood, and brothers and sisters. (Art. 877). The principle of unitary succession of the old Civil Code, under which system the successor to the "family" headship succeeded to all property, was replaced by a system of equal intestacy rights of all children, which cannot be fully defeated by testamentary disposition.

All these reforms have been contrary to Japanese traditions, and again, these traditions have not been uprooted by the mere act of legislation. In the rural regions in particular, there continues the custom that, upon the approach of old age, the peasant transfers his little holding undivided to one of his children, that this child or his spouse assumes the full burden of the support of the yielding farmer and his wife, and that the other children abandon their rights of succession. The discrepancies thus created between law and life have resulted in new difficulties, which were not entirely unforeseen. In anticipation of disputes the legislation of 1948 expressly provided for the establishment of family courts, which have not fulfilled, however, all the expectations placed in them by their originators.

With the termination of the occupation regime, agitation has set in to amend

[3] They are contained in the revised version of the Civil Code, which was promulgated as Act No. 260, of January 1, 1948. An English translation of this new Civil Code was published in 1952 by the Attorney General's Office, Liaison Section.

the legislation of 1948. Not all of these efforts are directed toward its undoing. There can also be heard the voices of those who only advocate revision of one or another matter of detail, as well as of those who wish to continue the legislative trend of the 1948 Law even further, especially by abolishing the still existing provisions of the Civil Code on succession to objects of family worship. Finally, there are those who are anxious to utilize the present concern about family law to remedy the discrepancy between marriage law and custom which has existed ever since the legislation of 1898.[4]

II

In order to decide whether it is really necessary to change the present system of conclusion of marriage, it would seem to be necessary to find out to what extent, if any, the discrepancy which in 1898 arose between marriage law and custom still exists today. It has been claimed that the extent of this discrepancy has diminished in recent years, but little has so far been known about the exact state of affairs. In order to ascertain it fully, a large scale, factual investigation would be required. Since no such comprehensive investigation has as yet been undertaken, the author of this article has attempted to ascertain the facts for at least a limited area.

The region selected was that in which Yamaguchi University is located, i.e., Yamaguchi Prefecture in the South of the Main Island of Japan. Statistics of couples living together in factual but not legally valid marriage are not available. For a registered marriage, it is possible, however, to determine the time interval that has passed between the factual inception of the marriage and its registration, because, since 1946, the date of the factual inception of the marriage is noted upon the index card upon which the marriage is registered. Although this date may not invariably be stated correctly by the parties, their statements may nevertheless be generally regarded as reliable.

In the communities which were chosen because of their typicity, results as indicated in Table 1 appeared, concerning the time interval between the actual inception and the registration of the marriages registered in the years 1947, 1948, and 1949.

When we compare the 7 districts, we find almost the same tendency in every district, but in commercial districts, such as Yanai Town, Murozumi, and in agricultural districts, such as Suō Village, Ikaji Village, people register a little earlier than in Tonda Town, Hikoshima, which is a factory neighborhood.

When we compare the years 1947, 1948, and 1949 in the various districts, we find that in Hikoshima the interval between the factual inception of the marriage and its registration has become shorter, while in Takamori Town and Tonda Town it has increased.

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[4] A Law Revision Commission was established in 1954. The Section on Civil Law, under the direction of Professor Wagatsuma, is to make recommendations for revision in matters of family law and inheritance upon inquiry of the Attorney General.

TABLE 1

Interval between Inception and Registration of Marriages in Japan
Yamaguchi Prefecture, by Districts, 1947–1949

Year	Within a Month	1 Month, 1 Day— 6 Months	6 Months, 1 Day— 1 Year	1 Year, 1 Day— 1 Year, 6 Months	1 Year, 6 Months, 1 Day— 2 Years	2 Years, 1 Day— 2 Years, 6 Months	2 Years, 6 Months, 1 Day— 3 Years	3 Years, 1 Day— 5 Years	Over 5 Years	Total
Suō Village, Kumage County, an agricultural community, population in 1948: 4,492										
1947	19	40	27	11	4	1	0	0	2	104
	(18%)	(38%)	(26%)	(11%)	(4%)	(1%)			(2%)	(100%)
1948	11	20	22	6	5	3	2	0	1	70
	(16%)	(29%)	(31%)	(9%)	(7%)	(4%)	(3%)		(1%)	(100%)
1949	17	23	19	6	1	2	1	3	2	74
	(23%)	(32%)	(26%)	(8%)	(1%)	(2%)	(1%)	(4%)	(2%)	(100%)
Ikaji Village, Kuga County, an agricultural community, population in 1948: 4,377										
1947	9	20	13	6	1	0	0	1	2	52
	(17%)	(38%)	(25%)	(12%)	(2%)			(2%)	(4%)	(100%)
1948	14	20	17	12	1	0	2	1	2	69
	(20%)	(29%)	(25%)	(17%)	(1%)		(3%)	(1%)	(3%)	(100%)
1949	14	29	25	5	5	1	1	2	2	84
	(17%)	(35%)	(30%)	(6%)	(6%)	(1%)	(1%)	(2%)	(2%)	(100%)
Takamori Town, Kuga County, a developed agricultural community, pop. in 1948: 9,068										
1947	36	66	62	27	6	2	0	4	5	208
	(17%)	(32%)	(30%)	(13%)	(3%)	(1%)		(2%)	(2%)	(100%)
1948	35	88	81	28	8	4	4	2	7	257
	(14%)	(34%)	(32%)	(11%)	(3%)	(2%)	(2%)	(1%)	(3%)	(100%)
1949	33	50	51	37	7	2	1	7	7	195
	(17%)	(25%)	(26%)	(19%)	(4%)	(1%)	(1%)	(4%)	(4%)	(100%)
Yanai Town, Kuga County, a commercial town, including an agricultural district, pop. in 1948: 20,162										
1947	52	80	50	17	5	4	4	6	1	219
	(24%)	(36%)	(23%)	(8%)	(2%)	(2%)	(2%)	(3%)	(0%)	(100%)
1948	49	77	75	34	12	5	3	5	5	265
	(18%)	(29%)	(28%)	(13%)	(5%)	(2%)	(1%)	(2%)	(2%)	(100%)
1949	62	82	58	32	8	3	1	7	9	262
	(24%)	(31%)	(22%)	(12%)	(3%)	(1%)	(0%)	(3%)	(3%)	(100%)
Tonda Town, Tsuno County, an agricultural district, having factories of the alkali industry in the neighbourhood, population in 1948: 8,215										
1947	12	60	59	20	8	3	3	3	6	174
	(7%)	(34%)	(34%)	(11%)	(5%)	(2%)	(2%)	(2%)	(3%)	(100%)
1948	33	45	72	39	7	3	4	4	1	208
	(16%)	(22%)	(35%)	(19%)	(3%)	(1%)	(2%)	(2%)	(0%)	(100%)
1949	19	23	39	16	4	1	2	4	4	112
	(17%)	(20%)	(35%)	(14%)	(4%)	(1%)	(2%)	(4%)	(4%)	(100%)

TABLE 1—*Cont.*

Year	Within a Month	1 Month, 1 Day—6 Months	6 Months, 1 Day—1 Year	1 Year, 1 Day—1 Year, 6 Months	1 Year, 6 Months, 1 Day—2 Years	2 Years, 1 Day—2 Years, 6 Months	2 Years, 6 Months, 1 Day—3 Years	3 Years, 1 Day—5 Years	Over 5 Years	Total
Hikoshima, a factory island, a part of Shimonoseki City, population in 1948, 7,018										
1947	14	35	44	24	8	4	2	7	6	144
	(10%)	(24%)	(31%)	(17%)	(6%)	(3%)	(1%)	(5%)	(4%)	(100%)
1948	12	35	45	26	8	2	1	5	6	140
	(9%)	(25%)	(32%)	(19%)	(6%)	(1%)	(1%)	(4%)	(4%)	(100%)
1949	18	36	31	16	4	3	0	2	2	112
	(16%)	(32%)	(28%)	(14%)	(4%)	(3%)		(2%)	(2%)	(100%)
Murozumi, a fishing town, population in 1948, 8,147										
1947	30	62	52	19	7	8	2	3	4	187
	(16%)	(33%)	(28%)	(10%)	(4%)	(4%)	(1%)	(2%)	(2%)	(100%)
1948	43	57	50	19	6	6	2	3	1	187
	(23%)	(30%)	(27%)	(10%)	(3%)	(3%)	(1%)	(2%)	(1%)	(100%)
1949	25	48	33	12	4	2	2	2	2	130
	(19%)	(37%)	(25%)	(9%)	(3%)	(2%)	(2%)	(2%)	(2%)	(100%)

Comparing all seven districts of Yamaguchi Prefecture together, we find the information given in Table 2.

According to this table, the number of people who registered before the factual inception of the marriage ceremony was 4 in 1947, 0 in 1948, and 3 in 1949; on the day of the factual inception of the marriage 2 in 1947, 2 in 1948, and 4 in 1949; within one month 166 in 1947, 195 in 1948, and 181 in 1949. The largest number was within one month; the number decreases gradually but not steadily thereafter; it sometimes increases. According to the table, 15.80% registered within one month in 1947, 16.47% in 1948, and 17.34% in 1949; registrations in 1 to 6 months occurred in 33.36% in 1947, 28.60% in 1948, and 30.03% of the cases in 1949. About half the marriages were registered within 6 months in all three years, while registrations within one year were 77.38% in 1947, 75.34% in 1948, and 73.79% in 1949.

When we compare this table with Table 3, compiled for various districts of Japan before the war, we can see that people now tend to register earlier than previously, although the trend does not show a steady development year after year. To what extent, if any, this trend has been caused by the postwar changes of constitutional and private law, can, of course, be only surmised.

The table seems to indicate that in cities people tend to register earlier than in the country, and that recently people tend to register earlier than formerly.

From the preceding tables, it appears that the number of marriages in which legal registration does not coincide with the factual inception is considerable. It is even larger if we consider that an as yet not ascertained proportion of marriages is never registered and thus never legalized at all. In an effort to

TABLE 2

Interval between Inception and Registration of Marriages in Japan
Yamaguchi Prefecture, 1947–1949

Interval	1947		1948		1949	
Before marriage ceremony	4		0		3	
On the day of the ceremony	2	172	2	197	4	188
Within a month	166	(15.80%)	195	(16.47%)	181	(17.34%)
From 1 month, 1 day to 2 months	144		92		92	
From 2 months, 1 day to 3 months	76		73		70	
From 3 months, 1 day to 4 months	60	363	67	342	40	291
From 4 months, 1 day to 5 months	53	(33.36%)	48	(28.60%)	55	(30.03%)
From 5 months, 1 day to 6 months	60		62		34	
From 6 months, 1 day to 7 months	46		66		48	
From 7 months, 1 day to 8 months	50		43		42	
From 8 months, 1 day to 9 months	55	307	63	362	38	256
From 9 months, 1 day to 10 months	58	(28.22%)	64	(30.27%)	46	(26.42%)
From 10 months, 1 day to 11 months	58		63		38	
From 11 months, 1 day to 1 year	40		63		44	
From 1 year, 1 day to 1 year, 1 month	39		44		30	
From 1 year, 1 month, 1 day to 1 year, 2 months	26		33		44	
From 1 year, 2 months, 1 day to 1 year, 3 months	18		30		12	
From 1 year, 3 months, 1 day to 1 year, 4 months	18	124 (11.4%)	21	164 (13.71%)	14	124 (12.8%)
From 1 year, 4 months, 1 day to 1 year, 5 months	15		17		15	
From 1 year, 5 months, 1 day to 1 year, 6 months	8		19		9	
From 1 year, 6 months, 1 day to 1 year, 7 months	6		7		3	
From 1 year, 7 months, 1 day to 1 year, 8 months	9		4		6	
From 1 year, 8 months, 1 day to 1 year, 9 months	9		13		9	
From 1 year, 9 months, 1 day to 1 year, 10 months	5	39 (3.58%)	7	47 (3.93%)	6	33 (3.06%)
From 1 year, 10 months, 1 day to 1 year, 11 months	5		9		6	
From 1 year, 11 months, 1 day to 2 years	5		7		3	
From 2 years, 1 day to 2 years, 1 month	3		5		6	
From 2 years, 1 month, 1 day to 2 years, 2 months	5		6		3	
From 2 years, 2 months, 1 day to 2 years, 3 months	3		6		2	
From 2 years, 3 months, 1 day to 2 years, 4 months	1	22 (2.02%)	1	23 (1.92%)	0	14 (1.44%)
From 2 years, 4 months, 1 day to 2 years, 5 months	7		3		2	
From 2 years, 5 months, 1 day to 2 years, 6 months	3		2		1	

TABLE 2—*Cont.*

Interval	1947		1948		1949	
From 2 years, 6 months, 1 day to 2 years, 7 months	1		5		1	
From 2 years, 7 months, 1 day to 2 years, 8 months	3		5		2	
From 2 years, 8 months, 1 day to 2 years, 9 months	1		3		1	
		11		18		8
From 2 years, 9 months, 1 day to 2 years, 10 months	2	(1.01%)	2	(1.51%)	1	(0.83%)
From 2 years, 10 months, 1 day to 2 years, 11 months	1		0		0	
From 2 years, 11 months, 1 day to 3 years	3		3		3	
From 3 years, 1 day to 5 years	24	(2.21%)	20	(1.67%)	27	(2.79%)
Over 5 years	26	(2.39%)	23	(1.92%)	28	(2.89%)
Total	1,088	(100%)	1,196	(100%)	969	(100%)

TABLE 3

Interval between Inception and Registration of Marriages in Japan
Comparative Percentages, 1927–1951

Interval	1927, Toyama Prefecture[a]	1940, Tokyo City[b]	1947, Kanda Ward, Tokyo City[c]	1947, All Japan[d]	1949, Tsuyama City[e]	1949, Yamaguchi Prefecture[f]	1951, Tokyuama City[g]
	%	%	%	%	%	%	%
Before the marriage ceremony and on the day of the ceremony	1.9	1.34	0.72		0.66	0.72	0.66
Within a month	4.4	10.25	16.68	9.62	9.01	16.62	25.77
From 1 month, 1 day to 6 months	22.8	18.87	35.29	39.91	20.66	30.03	29.95
From 6 months, 1 day to 1 year	30.9	46.65	23.81	28.17	32.53	26.42	18.72
Over 1 year	39.8	22.89	23.50	22.30	37.14	26.21	24.90
Total	100.00	100.00	100.00	100.00	100.00	100.00	100.00

[a] Research by the Section of Educational Affairs of Toyama Prefecture concerning 5,362 couples. Toyama Prefecture is rural.

[b] Research by the Population Problems Laboratory concerning 673 couples married for the first time.

[c] Research by Zensuke Ishimura concerning 1,205 couples (*cf.* No. 226 "Hōritsujiho," March, 1949).

[d] Research by the Department of Welfare.

[e] Research by Masanori Yamamoto, professor of Okayama University concerning 910 couples. Tsuyama City is agricultural.

[f] These are our above-mentioned statistics concerning 967 couples in 7 districts in Yamaguchi Prefecture. Yamaguchi Prefecture is an ordinary prefecture.

[g] Research by the author concerning 454 couples. Tokuyama City is an ordinary city having factories of the alkali industry.

obtain some information about the reasons why people fail to register their marriages immediately upon their factual inception, the author had 455 couples living in Yamaguchi Prefecture interviewed by a number of his students. These couples do not include 154 couples who live in Suō Village, Kumage County, which constitutes a standard rural community. The interviews were carried on in January 1950. All the couples interviewed in Suō Village had their marriages registered at some time during the period from January 1, 1947, to December 31, 1949, after previously having lived in an unregistered marriage relationship for some time.

The reasons stated for the parties' failure to register their marriages immediately upon inception can be tabulated as shown in Table 4.

Changes of the present law concerning the conclusion of marriage are demanded so widely because it is alleged that the presently existing discrepancy between the law and the mores results in serious hardship for many people. How serious are these hardships in actual fact? In certain respects they have been mitigated or eliminated by legislation. Factual spouses have thus been assimilated to legal spouses for purposes of Survivors' Insurance (Regulation

TABLE 4

Reasons stated for Failure to Register Marriages upon Inception: Yamaguchi Prefecture, Japan

Reason stated	Area: Yamaguchi Prefecture		Area: Suō Village	
(1) The parties did not know that a marriage is not legally valid until it has been registered:				
(a) The couple were ignorant of census registration.	66	98		58
(b) The couple left census registration up to their parents.	32			
(2) "Japanese family system"				
(a) It depends on the absolute right of the head of the family whether or not the wife is to be recognized as a Japanese "yome" [bride], hence he does not have the wife's name entered in his family register until she is "assimilated" in conformance with the family tradition.				
(i) Parents or the head of a house do not recognize.	49		5	
(ii) They do not register until a child is born. (In Japan, when a child is born the wife is recognized as "assimilated" to conform to the family tradition)	75		15	
(iii) The couple have discord	27		1	
(iv) It is uncertain if the wife may be assimilated to conform to the family tradition.	96	274	46	67
Opposite case, where husband married into family of wife, who is sole heir.	7		0	
(b) Registration is impossible, as both man and wife are sole heirs of their respective families.	20		0	
(3) Steps of registration regarded as too troublesome:				
(a) Witness	11	75	0	29
(b) Documents	64		29	
(4) Other reasons	8		0	
Total	455		154	

to Implement The Law Concerning Standards of Work in Employment, No. 23, 1948, Regulation of the Department of Welfare, Art. 42). Similar provisions can be found in other statutes concerning Labor Law, such as Nation's Health Insurance Act, No. 70, 1948, Act of Parliament, Art. 14, and Workmen's Compensation Act, No. 166, 1949, Act of Parliament, Art. 15.

The Supreme Court accorded certain property rights to the de facto spouse upon abandonment on January 26, 1915, for the first time. Since then judicial decisions have tended to ameliorate the hardship of the de facto wife. By judicial practice, the property assets owned by the parties to a merely factual marriage will be equitably distributed among them by the court in the case of the factual termination of the relationship, but mutual rights of succession upon death have not been recognized to exist between the parties.

In order to supplement this generally available information, the author has tried to obtain additional information in the course of the above mentioned investigations of couples living in Yamaguchi Prefecture. Although this aspect of the investigation was not pursued in a systematic manner, it may still be of interest briefly to report some of the results.

1. Where the marriage is not registered, the parties are apt easily to think of separation for even a slight cause. For example, we can find such cases as the following in a court of home justice in Iwakuni, Yamaguchi Prefecture.

(a) As a wife was not registered, her child's paternity could not be registered, so the couple had troubles over it, finally resulting in separation.

(b) A wife was accused by her husband, probably unjustly, of unfaithfulness; the couple had troubles over it and separated.

(c) A wife, who failed to pound rice and brought other rice from her parental house, thereby hurt her mother-in-law's feelings, and was forced to accept a separation.

(d) While a wife was staying in her parental house for a month to observe mourning, her husband's parents forced a separation, as they objected to her insufficient dowry.

(e) The husband to a "marriage" was forced by his parents to marry another woman whose name was then entered in the family register.

In all such cases the wife can demand solatium for "breach of promise of marriage" in a court of home justice. But this fact is not universally known; and some wives do not demand solatium, even though they know it is possible.

2. In Japan, once a child is born, the nonregistered wife is regarded as assimilated to the husband's family in conformance to the family tradition, and the wife and child usually have their names entered in the family register, but if they are left illegitimate, the child may easily bear a grudge against its parents.

3. When a husband has died, his nonregistered wife cannot inherit his property, nor can the husband inherit his wife's property. For example, in Ikaji Village, Kuga County, a couple had been living together without being legally married as long as thirty-two years, having left census registration to their parents. When the husband died in 1949, the wife became conscious of

her disadvantage for the first time. Now she is disputing the inheritance with her husband's brother.

Although the time interval between the factual inception of a marriage and its registration seems to have decreased in recent years, and although the hardships which can arise because of the discrepancy between the law of marriage and the mores have to some extent been mitigated, the discrepancy still exists to a large extent and with serious consequences. In what ways the situation can best be remedied, still requires further exploration.[5]

TOSHIO FUETO*

EDITOR'S ADDENDUM

A situation analogous to that described by the author has arisen in Turkey. Going beyond its Swiss model, the Turkish Civil Code of 1926 prescribes for the conclusion of a marriage not only that the parties celebrate a ceremony before a secular officer of the government but also that they previously obtain a medical certificate attesting the absence of venereal disease. Such a certificate

[5] Bibliographical references to books and articles:

A. Discussing the present law of marriage;
   (1) "Proponents of legal matrimony"
      (i) Takeyoshi Kawashima; "Factual Matrimony or Legal Matrimony?"—"The Family Organization in Japanese Society," pp. 196–198 (1948)
      (ii) Michio Aoyama; "Introduction to the Study of Family Law," pp. 66–71 (1955)
   (2) "Proponents of factual matrimony" Shunichi Suginohara; "Factual Matrimony or Legal Matrimony?"—"The Cultural Sciences," vol. 2 no. 2, 1948, pp. 43–44
   (3) Saburō Kurusu; "Development of theories concerning a wife not legally married"—"Gakujitsutaikan of Law Faculty of Tokyo University" (1942)

B. Criticizing the present law of marriage;
   (1) Shigetō Hozumi; "Family Law" P. 277 (1933)
   (2) Zennosuke Nakagawa; "Family Law" P. 280 (1942)

C. "The essentials of the revised bill of the family law," which was decided in 1925 in the special conference for revision of the civil law, completely recognized "Legal Matrimony."

D. Reporting on factual investigations concerning the discrepancy between Japanese marriage law and mores;
   (1) Zensuke Ishimura; "Time interval and places of marriage registration"—No. 226, "Hōritsujiho," March, 1949
   (2) Masanori Yamamoto; "Real States of marriage through census registers"—"Law and Economic Review of Okayama University" No. 1, 1951
   (3) Kimiyuki Takanashi; "One of States of Unregistered Marriage"—"Nihonhogaku" Vol. 16, No. 1 (1950)
   (4) Toshio Iio; "Real State of Unregistered Marriage—A Report of Investigation in Kyōto City"—"Hogakuronso" Vol. 57, No. 4, 1950
   (5) Takeo Ōta; "Unregistered Marriage in Agricultural and Fishing Communities in Kyōto Prefecture"—"Social Survey Report of the Research Institute of Humanistic Sciences, Kyōto University" No. 4 (1952)

E. Criticizing the reforms of 1948
   Michio Aoyama; "Criticizing the reforms of 1948 Marriage Law"—"A Study of the Japanese Family System" (1948)

* Assistant Professor of Law, Yamaguchi University, Tokuyama City, Japan.

can be issued only by the county physician. Rather than go to the trouble of a trip to the county seat, the embarrassment of a delicate physical examination, and the formality of a civil ceremony, many members of the peasantry prefer to conclude their marriage in the simple way of Islamic tradition. In the view of their fellow villagers, a marriage so concluded is fully respectable. The situation has resulted in difficulties similar to those experienced in Japan, aggravated, however, by the possibilities which it creates for the continuation of the officially proscribed institution of polygamy. In order to regularize the status of the children from informal marriages, it has been found necessary to enact a series of statutes assimilating their status to that of legitimate children. A powerful impetus to more frequent resort to the officially prescribed marriage formalities is said to have been created by the participation of Turkish troops in the Korean war. Family allowances were paid only to those soldiers' wives whose marriages had been concluded in the officially prescribed manner. Various proposals to remedy the present situation are being studied in Turkey. The agencies respectively charged with the task of finding remedies in Japan and Turkey might find it useful to exchange views and experiences. (The information contained in this Note was communicated by Professor Kifri Tinsser of the University of Istanbul and Professor Veldedelisağlu of the University of Ankara at the Colloque held in Istanbul on September 5–7, 1955, under the auspices of the Comité International des Sciences Juridiques (UNESCO).

TREATY ENFORCEMENT AND THE SUPREME COURT OF MEXICO

Given the long border between the United States and Mexico, it is not surprising that the transportation of stolen motor vehicles between the countries should constitute not only a problem in the control of border traffic but also a problem in the recovery of the vehicle in one state and its restoration to the lawful owner in the other state. Furthermore, a related problem is introduced where a person in the second state has purchased a motor vehicle only to be informed by the local authorities that the vehicle in question has been stolen and must be returned to the original owner in the first state; for in this situation, an issue is raised regarding deprivation of property the title to which has been acquired in good faith.

In 1936 the United States and Mexico concluded a Convention to facilitate the recovery and restoration of stolen motor vehicles, trailers, airplanes, or the parts thereof.[1] Under the terms of the Convention the authorities in one state, having sufficient grounds to believe that a stolen vehicle is within the jurisdiction of the other state, may submit a request for the detention and return of

[1] Convention for the Recovery and Return of Stolen or Embezzled Motor Vehicles, Trailers, Airplanes or Component Parts of Any of Them, signed at Mexico City, October 6, 1936. 50 Stat., pt. 2, p. 1333; 103 Diario Oficial, no. 20 (July 23, 1937), sec. 2, p. 1.

the vehicle through their embassy to the foreign office of the state of jurisdiction of the vehicle. The authorities of the state receiving the request, if satisfied by the documentary proof of ownership furnished by the demanding state, will proceed to detain the vehicle and to return it to the other state.[2] The Convention also provides that in the process of return the vehicle in question will be exempted from customs "duties, fines or other monetary penalties"; the cost of recovery, however, is to be borne by the recipient of the motor vehicle.[3]

In the Convention, the authorities of the respective states have a channel of communication which is part of the total process of recovery of a stolen vehicle. The process commences with the tracing of the vehicle which, as both parties to the Convention are federal states, requires the active co-operation of persons in various levels of government, including customs officials, licensing officials, and traffic policemen.[4] Once the vehicle has been located and detained, action must be undertaken to return it to the original owner. Throughout this process, attention must be given to the protection of the interest in the vehicle of the original owner and of the property right of a new owner where title to the vehicle has been acquired in good faith.

A dozen cases dealing with aspects of the recovery of stolen vehicles under the Convention have come before the Supreme Court of Mexico since 1946. The cases have arisen out of circumstances in which the appropriate Mexican administrative authorities, acting in pursuance of the Convention, have dispossessed a Mexican owner of an allegedly stolen motor vehicle with a view to returning it to the original owner in the United States. The Mexican owner has then sought to protect his title by instituting *amparo* proceedings, usually charging violation of Article 14 of the Constitution which provides *inter alia* that "no person shall be deprived of . . . property, possessions, or rights without a trial by a duly created court in which the essential elements of procedure are observed and in accordance with laws issued prior to the act."[5] Two main points are developed in this series of motor vehicle theft cases: the protection of constitutional guarantees to the individual through clarification of procedural requirements, and the status of the Convention as supreme law of the land.

Failure of administrative authorities to conform to express provisions of the Convention gave rise to a case in 1947. The Supreme Court held that detention of a motor vehicle by federal authorities without having received a prior request for this action from the American Embassy, in accordance with Article II, constituted a procedural irregularity where possession of the vehicle had been obtained in good faith by a Mexican national.[6]

[2] Articles I and II.

[3] Article V.

[4] Several years ago the writer had an opportunity to discuss the problem of tracing and recovering stolen motor vehicles with the special agent in Mexico City of the National Automobile Theft Agency.

[5] A. J. Peaslee, Constitutions of Nations, (Concord, N. H., Rumford Press, 1950) vol. II, p. 418.

[6] Re Rafael Yamín Sahede y coags., 93 Semanario Judicial de la Federación (5a Época),

Under Article 14 of the Constitution, affirmed in jurisprudence of the Supreme Court,[7] a person may be deprived of property only in conformity with previously enacted law and following judicial proceedings. Failure of administrative authorities to meet these two requirements has been the basis for complaint in most of the automobile theft cases. Article II of the Convention provides that the "Department of Foreign Relations of the United Mexican States . . . will use every proper means [*todos los medios apropiados*] to bring about the detention of alleged stolen or embezzled motor vehicles. . . ."[8] In the case of José Antonio Vera, the administrative authorities had sought to dispossess the complainant of his automobile by administrative action which it was argued came within the scope of the phrase "*todos los medios apropiados*." The Supreme Court, however, in affirming the grant of *amparo* to the complainant by a federal district court, held that both Article 14 and related jurisprudence of the Court permitted dispossession only by judicial authorization.[9] A year later the Supreme Court further clarified this ruling by pointing out that no judicial remedy is established by the Convention or by its implementing decree[10] whereby the individual can be protected in accordance with the above mentioned constitutional and legal provisions. An administrative hearing in the Department of Foreign Relations could not be construed as an adequate substitute for the judicial remedy.[11] On the other hand, dispossession is not irrevocable (i.e., *acto consumado de un modo irreparable*), so as to constitute grounds for a request for *amparo* where there is a possibility of recovery through the courts or the diplomatic channel or of obtaining an award of damages for the seizure.[12]

A second point of interest arising out of the motor vehicle theft cases concerns the status of the 1936 Convention in Mexican law. The Querétaro Constitution of 1917 contains a "supremacy clause" reminiscent of Article VI, section 2, of the United States Constitution. Article 133 provides that

"This Constitution, the laws of Congress arising thereunder, and all treaties in accordance therewith already entered into or which, in the future, may be entered into by the President of the Republic, with the approval of the Senate, shall be the supreme law of the land. And

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pt. 7, p. 1677 (August 20, 1947). The following analysis of motor vehicle theft cases is based on decisions of the Supreme Court of Mexico mainly as summarized in the official reports. It is not customary to publish in these reports the full texts of all decisions handed down by the Court.

[7] Thesis No. 817, Jurisprudencia Definida de la Suprema Corte, 97 Semanario Judicial, apendice, pts. 4–5, pp. 1477–78.

[8] 50 Stat., pt. 2, p. 1334; 103 Diario Oficial, no. 20 (July 23, 1937), sec. 2, p. 1.

[9] Re José Antonio Vera, Boletín de Información Judicial, Año IV, no. 35 (July 1, 1948), p. 239. The case is summarized in 96 Semanario Judicial, pt. 2, p. 1639.

[10] 110 Diario Oficial, no. 2 (September 2, 1938), p. 1.

[11] Re Vinicio Hernández del Valle, 100 Semanario Judicial, pt. 1, p. 890 (June 2, 1949). See also: Re Ignacio Gómez Hernández, *ibid.*, pt. 2, p. 1361 (June 16, 1949); Re Abarrotera Roldán, S. A., 102 Semanario Judicial, pt. 1, p. 192 (October 7, 1949).

[12] Re Manuel E. Conde, 104 Semanario Judicial, pt. 3, p. 2243 (June 26, 1950). Thesis 29, Jurisprudencia Definida de la Suprema Corte, 76 Semanario Judicial, apendice, p. 576.

the judges in every state shall be bound by this Constitution and by those laws and treaties, in spite of conflicting provisions in the constitution or laws of any state."[13]

This article was amended in 1934 to include the phrase "in accordance therewith," which would seem to serve as reassurance that treaties will conform to the norms of the Constitution. With regard to the status of treaties as "supreme law," the Supreme Court has held that treaties "have the force of law for all inhabitants of the country."[14]

In treating the cases which have arisen under the 1936 Convention, the Supreme Court has been careful to protect the legal status of the treaty as a commitment in internal law and as a contract under international law. The Government in the case of José Antonio Vera contended that Articles I, II, and V of the Convention, together with the implementing decree, furnished the administrative authorities with sufficient power to detain the motor vehicle, providing these authorities with a rule of law under Article 133 of the Constitution. In rejecting this argument, the Supreme Court reasoned that "it cannot be the intention of the said Convention that the Federal Executive, acting through its agents, should violate the Constitution," by following a procedure contradictory to the rule established in Article 14 for the protection of property.[15] Furthermore, the express provision of Article 15 of the Constitution that no "agreement or treaty [may] be entered into which restricts or modifies the guarantees and rights which this Constitution grants to the individual and to the citizen"[16] is a deterrent to administrative enforcement of the treaty in such manner as to violate the provisions of Article 14.[17] In most of the cases concerning the 1936 Convention, the Court has sustained the complainants' requests for *amparo* on grounds that the action of the administrative authorities has been *ultra vires*.[18]

Implicit in the series of motor vehicle theft cases is the possibility of conflict between the Supreme Court's duty to enforce the constitutional guarantees to individuals and its duty to enforce the terms of the Convention, a conflict which could only be resolved in favor of the organic act. Actually, however, no such dilemma has emerged, for the terms of the Convention are broad enough to comprehend resort to judicial proceedings where dispossession of a motor vehicle is at issue, and thereby, to avoid any conflict with the constitutional norms.

ALONA E. EVANS*

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[13] Peaslee, op. cit., vol. II, p. 459.

[14] Re Francisca Peyres Vda. de Bell, 22 Semanario Judicial, p. 576 (March 8, 1928). Re Concepción Alonso J., 90 Semanario Judicial, pt. 1, p. 681 (October 16, 1946). This case raised the point of whether the 1936 Convention was *ley privativa*.

[15] Boletín de Información Judicial, Año IV, no. 35 (July 1, 1948), p. 239. See also, Re María de Rosario Pelayo, 118 Semanario Judicial, pt. 1, p. 73 (October 9, 1953).

[16] Peaslee, op. cit., vol. II, p. 418.

[17] Re Pedro Mario Valenzuela, 103 Semanario Judicial, pt. 1, p. 297 (January 13, 1950).

[18] Re Juan José Brizuela Carvajal, 119 Semanario Judicial, pt. 1, p. 1197 (February 19, 1954). See also: Re José Barba Rubio, 118 Semanario Judicial, pt. 1, p. 480 (November 11, 1953).

* Wellesley College.

NEW LEGISLATION

DOMINICAN REPUBLIC: NEW CONSTITUTION—A new Constitution was promulgated on December 1, 1955, the twenty-sixth in the course of 111 years of Independence and the fourth under the Trujillo era. The labor of the Constituent Assembly was as rapid as it had been in 1934, 1942, and 1947 and without discussion; however, the technical draftsmanship was superior and carefully prepared, and the principal amendment was preceded by a campaign of propaganda to create a favorable atmosphere.

This amendment is the revival of the office of Vice-President, which had been eliminated in the 1942 Constitution. The age limit for office, including the Presidency, is reduced to 25 years. These two amendments, coupled with the previous press campaign, seem to indicate that the principal aim is to open a constitutional door to the election of Trujillo's eldest son as Vice-President in 1957 (he will then be 27).

The other amendments are of minor importance. Some merit brief mention.

A substantial change in the relations between Church and State stands out prominently. The former article 93 ("The relations of the Church and State will continue as they are at present, inasmuch as the Apostolic Roman Catholic Religion is the one that the majority of Dominicans profess"), similar to that in many Latin-American constitutions, has been replaced by a Title III on "Regime of the Concordat," which reads: "The relations between the Church and the State are governed by the Concordat between the Holy See and the Dominican Republic, in conformity with the Law of God and the Catholic tradition of the Dominican Republic." This new title is the result of the Concordat signed and ratified in the summer of 1954.

Once again in this Trujillo era, the attributes of the Executive Power are enlarged. The most important change is in connection with the Municipal Councils. The prior constitutions provided that the mayors (*síndicos*) and aldermen (*regidores*) and their alternates were elected by popular vote; under the new constitution, they are appointed, and removable, by the Executive Power. The regime of the ministries is slightly altered; previously, it was the function of Congress by statute to establish the departments and prescribe their functions. This power is now vested in the Executive, the President of course continuing to appoint the ministers. The prior authorization of the Congress to the Executive to declare war and make peace is eliminated, the new text is somewhat confused, however, as it refers only to the power of the President to meet an armed or imminent attack. Other attributes of Congress are slightly diminished; the last part of paragraph 8 of article 33, which provided for automatic cessation of a state of national emergency declared provisionally by the President, unless ratified by Congress within 10 days, is eliminated. The right of interpellation of cabinet officers in Congress is continued, but it now requires "prior authorization of the Executive Power."

Article 8 (former art. 6) on Human Rights is amplified, with some minor modifications. The amplifications cover a whole series of goals for the benefit of the family, mothers, children, old people, health, etc., and the poor, similar to those which have been included in recent years in many European and Latin-American constitutions. Two precepts which do not properly lie within the scope of a constitution stand out: No. 19 refers to the matrimonial property regime, based on free antenuptial agreements and the legal regime of separate property; No. 20 provides for the right to exclude from inheritance a descendant for unworthy acts "which tend to cast ill-repute on the good name of the family." The new initial phraseology of this article is worth noting. The former constitutions read: "The following are consecrated as inherent to the human personality." The new Constitution reads: "It is recognized that the principal purpose of the State is the effective protection of the rights of human personality."

This tendency to lay down programs by including general principles is to be noted in other new articles in the Constitution. For instance, article 3 incorporates the principle of nonintervention; article 7 declares the economic and social development of the territory of the Republic to be of supreme and permanent national interest. Two other general principles may prove of immediate practical importance; the new article 4 declares Communism to be incompatible with constitutional principles and orders sanctions against its adherents; and article 5 provides that the law shall determine the extent of the territorial seas and continental shelf belonging to the Nation.

An important addition is made to article 99 (former article 96); the provision is repeated that mineral deposits belong to the State, which may grant the right to work them by concessions to private individuals, but it is now added: "The State may transfer or assign the property of certain deposits." The new paragraph IV added to article 108 is of importance; the State unlimitedly guarantees financial obligations incurred not only by the Administration but also by autonomous organs; the shares, bonds, and other obligations of the state banks are specifically mentioned.

Apart from some changes of phraseology, of no great importance, the remaining new precepts are the fruit of the peculiar politico-personal regime of the Dominican Republic in the Trujillo era. Eulogies to Trujillo as the father of his country; statues and monuments in his honor; the sanctity of the property of those who have been Presidents or Vice-Presidents and of the property of their widows and children "which may not be attached nor expropriated" (arts. 112, 113, 107). The classical right to organize political parties is repeated (art. 106), but adds a curious tribute to the Dominican Party (Trujillo's) as the agent of civilization.

In short, this 1955 Constitution is not a new constitution, but a partial amendment of the former one. The principal amendment is the restoration of the office of Vice-President and lowering of the age qualification. A series of programs is added. The authority of the Executive is enlarged in a few particulars, especially to the detriment of municipal authorities. And it glorifies the man who has dominated the republic for a quarter of a century. Like its pred-

ecessors of the 1934, 1942, and 1947 amendments, it is only one more cloak to suit the different circumstantial conveniences of one of the most rigid dictatorships that Latin America has ever known in the course of its history.

JESUS DE GALINDEZ*

* Columbia University, New York.

JAPAN: AUTOMOBILE SECURITY ACT OF 1956—On July 29, 1955, the Japanese legislature enacted a law which, according to its first article, is designed "to secure the financial liability for death or bodily injury arising from the operation of automobiles and thus to protect the victim and to promote the sound development of motorized traffic." This Automobile Liability Security Law was put into effect as of February 1, 1956, by Cabinet Order of October 18, 1955. In view of current endeavors in the United States and elsewhere to improve what is generally recognized as an intolerable situation fraught with great social, economic, and political danger,[1] the Japanese experiment may be of interest.

The new compulsory liability insurance in amounts fixed by law (Cabinet Order, Art. 2 prescribing amounts from about $100 to $1,000 for injury and death) is of course not peculiar to this experiment, being a feature of the laws of many, if not most, countries. Nor does coverage available in cases of uninsured or unknown operators (Arts. 71 *et seq.* of the Law) reach beyond existing devices such as the Unsatisfied Judgment Fund laws of the Canadian Provinces, of France, or the state of New Jersey. Open substitution for what in the United States has become a liability for "negligence without fault,"[2] of a quasi-strict liability (Art. 3) is well-known from European models and the proposals of the Institute for the Unification of Private Law in Rome. And finally even the great share of the government in the new plan, including a statutory reinsurance (Art. 40) at 60 percent, has been foreshadowed in the administrative compensation scheme of the Columbia Plan, in part enacted in 1947 in the Canadian province of Saskatchewan.

What is entirely new, however, is an elaborate mechanism of so-called "provisional payments" according to Article 17 of the Law and Article 5 of the Cabinet Order. The mere fact of having caused death or injury by the operation of an automobile entitles the victim to demand payment from the insurer in an amount of about one third of the compulsory policy limits. Reimbursement of amounts thus "provisionally" paid in the absence of liability, is limited to a claim by the insurer against the government which in turn may, but hardly ever will, recoup itself from the victim. This last provision, within its narrow confines, closely approaches what has been advocated as a substitution of loss for liability insurance.[3]

[1] See in general my "Full Aid" Insurance for the Traffic Victim—A Voluntary Compensation Plan (1955).

[2] See my "Negligence without Fault" (1950).

[3] See op. cit. *supra* note 1.

Notwithstanding its progressive orientation, the new law, however, offers another illustration of the growing need for a rethinking of our entire law governing the distribution of losses inevitably caused by modern mechanical enterprise with a view to the complete reconstruction of the traditional concepts of liability and insurance. For, again we find those inconsistencies which everywhere have so decisively impeded progress in this vital field, namely the continuing prevalence of formulas developed within the purportedly admonitory law of a liability for "torts" (i.e. wrongs) and the concomitant reliance on a purely compensatory system of liability insurance.

In the first place, Article 3 of the Act exempts the operator of an automobile from liability to any victim solely at fault. While generally and everywhere accepted as a self-evident principle of tort law, this rule has clearly no room in any system primarily serving loss distribution and is inconsistent with the Act's avowed aim to protect injured persons by "a system of guaranteed compensation." (Art. 1). Its only possible rationalization must rely upon the purely admonitory purpose of promoting greater care by punishment. Like a criminal sanction, such a punishment, in order to be fair and effective, would have to take into consideration, however, degrees of fault and the defendant's wealth. Neither requirement is met in Article 3, any more than in any other existing law on this point, and the racing millionaire as well as the commuting clerk, the criminal returning from a drinking bout as well as the physician hurrying on to save his patient, are punished by the forfeiture of their claims, however varied and fortuitous in their amounts. "Tort fines" of the type advocated by Scandinavian writers,[4] determined by the admonitory elements of criminal fines, i.e. fault and wealth, rather than by the accidental extent of the loss, would have been more adequate. Their proceeds incidentally might have been used to replace the government's contribution (Art. 82), hardly justifiable on principles of private insurance.

Under a scheme of consistently combining compensatory insurance (against loss rather than liability)[5] with admonitory tort fines, and a gradual but substantial increase in the rates of compensation, it may yet become possible to eliminate the claims under traditional tort rules for amounts exceeding the guaranteed compensation (Art. 3, 4), which have proved so fateful to the operation of the Saskatchewan plan.

Secondly, under a scheme primarily serving compensation there seems to be little room left for the compensation insurer's subrogation against third parties (Art. 46). In the vast majority of cases, such subrogation is based on the assertion and proof of a mere technical negligence, which for that very reason is accessible to a liability insurance otherwise protecting a wrongdoer against the consequences of his own wrong. A primarily compensatory subrogation, however, cannot be justified if benefiting an insurer who has calculated its

[4] *Cf.* Von Eyben, Försäkringsret, erstatnigsret og politiret, Festskrift till Ussing (1951) 126.

[5] See op. cit. *supra* note 1, at 20 ff.

premium with a view to the risk of the loss it now seeks to shift. Once this risk has been distributed through (first party loss) insurance it should not be reallocated by the obsolete means of a nineteenth century "tort" law.

All these more technical problems will probably have little impact on the actual operation of the Japanese Act which, with its strong government participation, its small amounts of guaranteed compensation, its merely supplementary functioning in competition with other compensation claims (Art. 73), its system of "provisional payments," and finally its "non-profit" rule (Art. 25), must be prevailingly characterized as a device of social welfare.

This was no doubt unavoidable under the compelling impact of the social and economic strictures of the postwar era, even under the present outspokenly conservative-capitalistic government. That nevertheless the idea of private insurance has prevailed and thus furnished the legislative structure for a truly progressive solution, must be credited to the imagination and skill of Japanese scholarship and statesmanship. We may cherish the hope that other countries will not have to await similar need and stress before they will be permitted to discard time-worn formulas and institutions.

ALBERT A. EHRENZWEIG*

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* Board of Editors.

VENEZUELA: COMMERCIAL LAW REFORM—Venezuela is making progress in modernizing its commercial law.

On April 14, 1955, a law on Conditional Sales was passed (Official Gazette, Special No. 452, April 21, 1955, and in No. 24,736, May 5, 1955). It is reproduced in a useful book edited by Dr. Roberto Goldschmidt, special adviser on commercial law to the Government, entitled *Las Ventas con Reserva de Dominio en la Legislación Venezolana y en el Derecho Comparado* (Caracas 1956). The book includes, *inter alia*, a commentary on the new law by Dr. Goldschmidt, a comparative essay by Dr. Zambrano Velasco, the text of a dozen foreign laws and drafts, including a translation of our Uniform Conditional Sales Act.

While based principally on foreign legislation, the law is adapted to special Venezuelan needs. It seeks a just balance between the interests of seller and buyer. The protection of the seller against third parties does not extend to articles of a value less than 250 bolivars ($80 m.o.l.) or to fixtures considered an integral part of real estate. The maximum term is 5 years. No special registry is provided for, except (under a prior law) for vehicles, but the contract must be filed in a court or notarial office at the seller's domicile. Risk of loss is on the buyer, but the seller warrants fitness and is obligated for repairs (art. 6): the scope of these obligations is not clear. A bona fide purchaser in market overt or at judicial sale is protected—a provision that undoubtedly weakens the seller's security.

A law of July 26, 1955 (Official Gazette, Special No. 472, October 17, 1955; Revista de la Facultad de Derecho, Caracas, No. 7, April 1956, pp. 159–172)

introduces a number of reforms and additions to the Commercial Code of 1919 as amended. Some of these are: A married woman can now be a trader without the consent of the husband (art. 16 as renumbered); penal provisions against issuing worthless checks are strengthened (art. 494, as renumbered); changes as to books of account (art. 32 *seq.* as renumbered). Sales in bulk are regulated for the first time (renumbered arts. 151, 152), requiring publication of notice, during the course of which creditors may demand payment or adequate security; failure to comply with the requirements makes the purchaser liable.

The limited liability firm (*compañía de responsabilidad limitada*), heretofore unknown in Venezuela, is authorized and regulated (arts. 312–336, and technical conformatory changes in numerous other articles). The minimum capital is 20,000 Bs; maximum, 2 million Bs. The entire capital must be subscribed and one half of the cash contributions or the full amount, if property, paid on organization. Shares are not transferable unless first offered to the other partners or without the consent of partners holding ¾ of the capital. If these conditions are not met, the firm must either find a purchaser or pay off the withdrawing partner. Representative actions against the directors or managers require that the plaintiffs hold at least a 10% interest in the capital. Auditors (*comisarios*) may be provided for in the articles and are obligatory for firms having a capital of more than 500,000 Bs; in this respect, the large firms are placed on the same footing as corporations. The organization of stock corporations in Venezuela, in contrast with most Latin-American countries, has been relatively easy. Hence, there has been no urgent need for the limited liability firm. Venezuela is merely following the general trend elsewhere.

VENEZUELA: INDUSTRIAL PROPERTY—Attention is called to the new Law of Industrial Property of September 2, 1955 (Gaceta Oficial No. 24,873, October 14, 1955; Revista de la Facultad de Derecho, Caracas, No. 6, January 1956, pp. 77–101). Inventions, designs, and models patented abroad can be patented in Venezuela for the unexpired term of the foreign patent, but not to exceed 10 years, the maximum term under the Venezuelan law, but the foreign patentee enjoys a preferential right to a Venezuelan patent only for 12 months from the date of registration abroad (arts. 10, 11) and all patents must be worked within 2 years from date of registration (art. 17). Foodstuffs and pharmaceutical products, *inter alia*, are not patentable (art. 15(1)). The annual tax depends on the nature of the invention: 50 bolivares ($15) for improvements in agriculture or health; 100 bolivares, for industrial products; 200 bolivares for luxury articles (not defined) (art. 48). Patent and trade-mark agents must be licensed; licenses are granted only to lawyers, economists, and those previously engaged in the business, and licenses are revocable for misconduct (art. 53). Trade-marks are registered for 15 year terms, renewable indefinitely (arts. 30, 31). Infringements and unfair competition are penalized by fines and/or imprisonment (arts. 97–105).

VENEZUELA: TRAFFIC BUREAU—The traffic law of August 22, 1955, effective July 1, 1956, (Gaceta Oficial No. 24870, Oct. 10, 1955; *Revista, supra*, pp. 103–111) contains some unusual features. In effect, a special administrative court is created, with jurisdiction, *inter alia*, to assess damages for personal and property injuries; the traffic bureau or court, a dependency of the Ministry of Communications, in addition to its own power to impose fines and imprisonment up to 30 days, also intervenes in criminal prosecutions. Drivers and owners are required to post bond or other security, to a maximum of Bs. 60,000 ($18,000) for personal injuries and Bs. 30,000 ($9,000) for property damage.

PHANOR J. EDER*

* Board of Editors.

DECISIONS

FRANCE: RECENT DEVELOPMENTS IN THE LAW OF ALIMONY SETTLEMENTS INCIDENTAL TO DIVORCE—Recent developments in the French law of alimony settlements incidental to divorce deserve some attention as they may affect the relations between American citizens divorcing in France.

The French law of alimony incidental to divorce raises a problem of classification which is largely responsible for the confusion existing in this field. Pursuant to article 301, paragraph 1, Fr. Civ. Code, the spouse in whose favor the divorce is pronounced may be granted alimony up to and not in excess of one third of the other spouse's income. Traditionally, it is said that this alimony is both "compensatory" (*indemnitaire*) and "alimentary" (*alimentaire*) in character, two expressions which need clarification.

What is meant by saying that alimony is "compensatory" is merely that alimony is intended primarily to indemnify the innocent party for the loss of the right of support enjoyed during the marriage. Emphasis upon this consideration undoubtedly explains several similarities between alimony and tort law. One such similarity is the requirement that a claimant seeking alimony prove the existence of a prejudice. Alimony will not be granted unless he proves to the satisfaction of the court that the loss of the right of support, in depriving him of the financial assistance that he could have claimed had the marriage not been dissolved, effectively injures his interests.[1]

Again, the claim for alimony, like a claim for tort damages, may be filed either at the time the prejudice is suffered or at some time thereafter within the applicable period of limitation. Thus, so long as the claimant proves the

[1] See e.g. Cass. October 18, 1926, Devaye v. Ardisson, D.P. 1927.1.101; February 15, 1938, Roses v. Roses, Sirey 1938.1.132; May 1, 1939, Grisot v. Papon, D.H. 1939, 387; July 1, 1952, Ardouin v. Ardouin, Sirey 1953.1.101.

existence of a prejudice contemporary to the divorce, he is not barred from subsequently claiming alimony, however tardy may be his claim.[2]

However, the "compensatory" nature of alimony does not adequately explain some of its other characteristics which are obviously foreign to the law of torts. One such characteristic is that the alimony can never exceed one third of the guilty party's income, regardless of whether the prejudice really suffered by the innocent party would call, under the ordinary rules of tort law, for larger damages (article 301, para. 1, Fr. Civ. Code). Moreover, in the determination of the amount of alimony, regard is had both to the needs of the claimant and the resources of the defendant, factors which are normally not material in the law of torts. Moreover, it is also noteworthy that alimony, once granted, is always subject to judicial review and may be varied in accordance with respective changes in the financial position of the creditor and the debtor. According to circumstances, therefore, the alimony may be increased or decreased.[3] These particular features of alimony under French law are ordinarily explained by referring to the "alimentary" character of alimony. It is said that alimony partakes of the same nature as the right of support which it is intended to replace and is consequently subjected, like that right, to the rules governing alimentary obligations in the field of domestic relations.[4]

To a large extent, therefore, the French concept of alimony is hybrid in character. In certain respects, it is governed by such rules as are proper to the law of torts, and in others by rules proper to alimentary obligations. According to circumstances, courts may be inclined to give a legal basis to their decision by laying emphasis upon one or the other character of alimony. "Compensatory" v. "alimentary" alimony may have its day in court, and the result may not always be that which could have been logically expected. Recent developments in the law of alimony settlements bear sufficient testimony to this fact.

Until recently, it could be broadly and safely stated that the parties could settle amicably the question of alimony. As a rule, alimony settlements inci-

[2] See e.g. Cass. March 10, 1891, van Broek v. Bardac, Sirey 1891.1.48; May 1, 1939, Grisot v. Papon, D.H. 1939, 387; May 23, 1939, Accassat v. Panneton, D.H. 1939, 403; May 13,1952, Desamis v. Baranger, Sirey 1953.1.101, J.C.P. 1952, II, 7133. See also Planiol and Ripert, 2 Traité Pratique de Droit Civil Français, 2nd ed. (1952) No. 639; Aubry and Rau, 7 Droit Civil Français, 6th ed. (1948) 289; Beudant, 3 Cours de Droit Civil Français, 2nd ed. (1936) 112; L. T. Bates, The Divorce and Separation of Aliens in France (1929) 55; Dabin, "Le Système de la Pension Alimentaire après Divorce," Revue Trimestrielle de Droit Civil 1939, 885.

[3] See e.g. Cass. May 12, 1936, Martin v. Barbier, D. P. 1936.1.109; January 17, 1939, Chardard v. Graziani, D. C. 1941, 121; June 13, 1946, Ternisien v. Lucas, D. 1946, 327; July 28, 1949, Lefranc v. Lefranc, D. 1949, 443. Alimony may even be revoked, as for example in the event the creditor remarries, see e.g. Cass. December 21, 1938, Bresciano v. Arrighi, D. C. 1941, 121; January 29, 1953, Fouchet v. Bigot, D. 1953, 223, J.C.P. 1953, II, 7516; see, however, Court of Appeal Grenoble November 30, 1949, Couturier v. Dubrandy, Sirey 1950.2.71.

[4] Ripert, "Le Caractère de la Pension Alimentaire Allouée en Cas de Divorce," D. H. 1927, Chronique, 53.

dental to divorce were held valid by French courts.[5] This rule was based on the "compensatory" character of alimony, which it was felt rendered alimony, like damages in general, susceptible to compromise agreements. There was, however, one exception to the rule, founded upon the prohibition of divorce by mutual consent. Whenever it appeared that an alimony settlement was made in consideration of the consent of the beneficiary to divorce, the settlement was declared null and void as having an illegal consideration (*une cause illicite*).[6] This exception to the rule prevails to this day,[7] although the qualification "exception" may not now be correct since the rule itself may have changed.

In the case of *Martin v. Martin*,[8] the French Supreme Court held invalid an alimony settlement made in consideration of a waiver by the beneficiary of her right to appeal a lower court divorce decree. In the case of *Ricard v. Ricard*,[9] H. had agreed after a decree of judicial separation to make monthly payments to W. Several years later, W. sought and obtained an order increasing the alimony despite H's contention that under the terms of the settlement she was barred from claiming additional alimony. It was held that this settlement was null and void on the ground that matters of alimony can, no more than alimentary obligations in general, be the object of a compromise.

These decisions have been hailed as a reversal of the previous case law, and indeed it seems, at first glance at least, that this conclusion is correct.[10] It is certainly true that in the case of "compensatory" v. "alimentary" alimony the score is now in favor of the latter concept. Instead of emphasizing the "compensatory" character of alimony, as the courts did until 1949 to validate alimony settlements, they now emphasize the "alimentary" character of alimony to invalidate such settlements. The reason behind these new decisions is understandable. In times of inflation and depreciation of the national currency, to maintain the binding character of settlements entered into a long time ago, would in many cases amount to hardship on the beneficiary. Under pressure of economic circumstances, the courts have felt that a means should

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[5] See e.g. Cass. July 20, 1899, Danjard v. Worvitch, D. P. 1890.2.248; July 28, 1903, Sombstay v. Ducloux, Sirey 1905.1.9. See also Planiol and Ripert, 2 *op. cit.*, No. 638; Aubry and Rau, 7 op. cit., p. 291.

[6] See e.g. Cass. January 15, 1929, Brisset-Vermon v. Vermon, D. H. 1929, 81; see also Richardot, Les Pactes de Séparation Amiable, Thesis, Dijon (1931); Savatier, "Les Pactes de Séparation Amiable," Revue Trimestrielle, de Droit Civil 1931, 531.

[7] See Cass. January 14, 1954, Follenfant-Sallet v. Gross, D. 1954, 253, and January 21, 1954, Michaut v. Druesne, D. 1954, 254, both cases are also found in J.C.P. 1954, II, 7967.

[8] Cass. February 28, 1949, Sirey 1949.1.86, D. 1949, 301.

[9] Cass. May 23, 1949, J.C.P. 1949, II, 5202, D. 1949, 443.

[10] See e.g. P. Esmein, "Le Double Visage et les Singularités de la Pension Alimentaire après Divorce," Dalloz 1953, Chronique, pp. 67–70; P. Hébraud, "La Pension de l'Article 301 du Code Civil et les Conventions en vue du Divorce," J.C.P. 1952, I, 978; H. Sinay, "Les Conventions sur les Pensions Alimentaires," 52 Revue Trimestrielle de Droit Civil, (1954) 228.

be found to review alimony settlements as well as judicial alimony. This, they could not easily do as long as they laid the emphasis on the "compensatory" nature of alimony. Under the "alimentary" concept of alimony, however, this power of judicial review could be exercised with less difficulty. Hence, the change in the analysis of the juridical nature of alimony.

However, it is questionable whether the extent of the reversal is as great as the two 1949 cases may lead one to believe. Indeed, it is quite characteristic that, in the most recent cases decided by the Court of Cassation, the Court, although it invalidated two alimony settlements, did not base its decision on the "alimentary" character of alimony. Instead, it relied on the traditional rule that settlements incidental to divorce by mutual consent are illicit and, therefore, invalid.[11] Moreover, one may wonder whether the fear of divorce by mutual consent is not the proper explanation for the 1949 cases. True, this fear is not explicitly expressed in the case of *Ricard v. Ricard*, but it is certainly not foreign to the case of *Martin v. Martin* in which the waiver of a right to appeal strangely resembled a consent to the divorce. Everything considered, therefore, it is not entirely clear whether the supposed new trend of the law inaugurated in 1949 is as spectacular a reversal of the previous case law as would appear on the face of the 1949 cases.

So much the more since, assuming that such a reversal has taken place, it would be wrong to conclude that alimony settlements are now totally deprived of practical significance. At least in those cases in which alimony settlements are not intended to sanction a divorce by mutual consent, such settlements are, now as yesterday, useful in several respects, a few of which are worth mentioning. Thus, an alimony settlement may prove valuable to both parties in helping them to settle amicably the manner in which (e.g. in cash or in kind) or the time at which (e.g. monthly or yearly instalments) alimony shall be paid. Secondly, if the agreed alimony is reasonable in regard to the resources of the debtor and the needs of the beneficiary, it is unlikely that judicial review, if additional alimony is sought, would import substantial changes into the parties' agreement. Thirdly, assuming that the agreed alimony becomes insufficient and that there is matter for judicial review, the existence of a settlement may prove useful to the beneficiary since such a settlement can be construed as an acknowledgment of the needs of the beneficiary, making it difficult for the debtor to resist a claim for increased alimony.[12] Finally, the debtor also may profit from an alimony settlement. For instance, the beneficiary under such a settlement may, despite his needs, feel morally bound to respect the terms of the settlement or be reluctant to start new proceedings against the debtor. More specifically, the debtor against whom a claim for additional alimony is filed is entitled to ask the beneficiary to account for the sums that the latter has already received. Thus, for example, a beneficiary who has received a lump sum in lieu of alimony must, before his claim can be

[11] See Cass. January 14 and 21, 1954, cited above.

[12] See Cass. February 16, 1955, Lévy, J.C.P. 1955, IV, p. 55.

enforced, prove that he has spent or otherwise dissipated the sum already paid, a proof which may not be so easily made.

For all these reasons, a word of caution is necessary in weighing the importance of recent developments in this field. The main advantage, or the major inconvenience of these new cases, depending upon how one feels about them, is to increase the scope of judicial control over alimony matters. Beyond this, it is as yet too early to know what impact the new decisions may have on the current practice of settling amicably alimony.

GEORGES R. DELAUME*

* Attorney, International Bank for Reconstruction and Development.

AUSTRIA: GERMAN TRADE-MARKS AND THE 1883 PARIS CONVENTION—An interesting commentary on the comparative laws of unfair competition, arising out of the Russian occupation of Austria, was written recently by the Austrian courts[1] with respect to the famous "secret recipe" eau de cologne "4711," a trade-mark with which the author was involved in World War I and World War II litigation in this country.

The above trade-mark is best known in the legal history of the United States as having been associated with the doctrine enunciated by our courts after World War I, that the Alien Property Custodian cannot vest or seize a secret recipe, and that a trade-mark or trade-name cannot be assigned without the secret.[2]

The said trade-mark was again the subject of seizure by the Alien Property Custodian in World War II and consequent litigation, which, however, was settled and never reached the courts. The further contention was there advanced that under the Paris Convention of 1883,[3] to which this Government

[1] IV Cg 738/55 (Handelsgericht Vienna, 11/8/1955); affd. 3 R 547/55 (Oberlandesgericht Vienna, 11/25/1955).

[2] Mulhens & Kropff, Inc., v. Ferd. Muelhens, Inc., 43 Fed. [2d] 937; affd. 48 Fed. [2d] 206.

[3] Union of Paris, March 20, 1883.

According to the Patent and Trade Mark Review, Vol. 48, 1949–1950, p. 216, on January 28, 1950, the Government of Switzerland advised of the adherence of the German Federal Republic to the International Union for the Protection of Industrial Property.

That the Paris Convention has not been abrogated by the war arises also from the following facts:

Law No. 8 of the Allied High Commission in Germany, dated October 27, 1949, on "Industrial, Literary and Artistic Property Rights of Foreign Nations and Nationals," provides, in Art. 6, par. 2. (b), that the provisions of par. 1 of this article concerning applications shall apply only to a foreign nation and the nationals thereof which officially notifies the Patent Office prior to April 1, 1950, that it accords rights of priority at least as great as those *specified by the Convention* in respect of application filed with the Filing Office, etc. (Patent & Trade Mark Review, Vol. 48, 1949–1950, p. 56).

It follows clearly from this wording that the continuance of the Convention is assumed.

In the same Law, one finds in Art. 13, par. 2, that the German legislation therein set out is deprived of effect in the territory of the Federal Republic; under subdiv. (a) to (f), inclusive, of said paragraph, such ordinances are enumerated, which discontinued the industrial right of certain nationals of nations at that time enemies of Germany. If these ordinances would be

and Germany were signatories, and which received implementation by the Lanham Trade-Mark Act of 1946,[4] this country must respect and protect the trade-mark rights of German nationals.

This contention accorded with the holding of the well-known *Prunier* case,[5] where the court stated the following:

"The plaintiff clearly has the right to bring an action in the courts of this State for the relief sought. Apart from the right in general of a non-resident or a foreign corporation to sue in our courts, the right of a French corporation to sue here for protection against unfair competition was expressly granted in the convention between the United States and various other powers for the protection of industrial property, as revised on June 2, 1911 (38 U.S. Stat. at Large, p. 1663). Article 10½ reads: 'All the contracting countries agree to assure to the members of the Union an effective protection against unfair competition.' (*French Republic* v. *Saratoga Vichy Co.*, 191 U.S. 427; *Winthrop Chemical Co., Inc.*, v. *Blackman*, 150 Misc. 229; *Phillips* v. *Governor & Co., etc.*, 79 F. [2d] 971, 972.)"[6]

The recent Russian occupation of Austria has brought about certain parallel legal situations arising out of the following state of facts.

The parent Cologne House of "4711" had for many years dealt in Austria with an affiliated firm which distributed merchandise bearing the German trademarks of "4711." The Russians, as part of their occupation policy, seized the assets of the affiliate and finally, in 1955, assigned the same to the Austrian Government, pursuant to the terms of the State Treaty between Austria and the Allied Powers.[7] The Austrian Government appointed a custodian to operate the seized enterprise on behalf of the Government.

There followed a competing claim to the right to sell "Original 4711" products in Austria. One was asserted by the new branch of the Cologne House and the other by the enterprise operated under the auspices of the Austrian Government.

The Cologne branch appealed to the Austrian Commercial Court and sought an injunction to prevent its competitor from designating its merchandise as "Original 4711" products and from using packaging materials which imitated the German originals.

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abrogated without being replaced by new legislation, these former hostile enemy nationals would remain without any rights in Germany. Therefore, it must be implied that once these special laws were suppressed, the Conventions automatically again come into force.

During the First World War, as well as during the Second World War, the Office of Berne published in the Review "Propriété Industrielle," that the survival of Union rights, in spite of the war, should not be in doubt. This statement may be found in the 1914 edition on p. 131 and in the 1939 edition on p. 150.

[4] Chapter 540, Title IX, §44, subdiv. (b); 15 U.S.C., §1126 (enacted July 5, 1946).

[5] Maison Prunier v. Prunier's Restaurant & Café, Inc., 159 Misc. 551 (Supreme Ct., N.Y. Co., 5/31/1936, Shientag, J.)

[6] *Supra*, at p. 554.

[7] 11 U.S. Cong. News (1955), p. 2525, Part IV—Claims Arising Out of the War, Article 22, par. 6, pp. 2530, 2531.

The court granted a temporary injunction,[8] which was affirmed on appeal,[9] and which ultimately led to an out of court settlement of the dispute.

The reasoning of the Austrian courts was as follows:

The seizure of the old branch in Austria by the Russians was a seizure of an enterprise having a situs in Austria and could not be considered to be directed against the Cologne Parent House which is located in Western Germany. The rights of the latter, including such industrial rights as trade-marks and protection against unfair competition, could not be touched or affected by the seizure. The Cologne entity must be deemed to enjoy such rights in the same manner as an Austrian national on the basis of the Paris Convention of March 20, 1883 (as amended in London), to which Austria as well as the German Federal Republic are parties.

That which belonged to Cologne, i.e. the aforesaid industrial rights, could not legally be confiscated by Russia, because Cologne was not within the Russian orbit of power. The actions of the Soviet Union could at best be attributed to an attempt to ignore the situation by application of force, but a contention that the seizure affected rights outside of the Russian zone of influence could not be placed upon a legal basis.

When the Soviet Union transferred to the Austrian Republic all the assets and rights that it had seized, it transferred only that which had been legally seized. The Paris Convention, which has the force of Austrian law in Austria, was not affected by extralegal acts of the Russian authorities. Since the Russians never legally owned the rights belonging to Cologne, they did not actually transfer the same to the Austrian Government.

Consequently, when the Austrian enterprise advertised its merchandise as "Original 4711" and used labels imitating those used by the Original House of Cologne, it was violating the provisions of the Austrian Law Against Unfair Competition.[10]

Cologne having the right of priority to the use of the term "Original 4711" and to the use of the labels, it can assert its right under the Paris Convention against any firm not connected with Cologne and is thus entitled to an injunction prohibiting the use of imitative labels, bottles, etc. Since the Austrian enterprise is the guilty party, the Cologne firm is properly entitled to the injunction.

The above reasoning, in addition to its parallels with legal precedents in this country, is of special interest, in that it demonstrates the laudable independence of Austrian courts from governmental interest and the firm refusal to permit governmental fiscal policy to interfere with justice.

OTTO C. SOMMERICH*

[8] IV Cg 738/1955.

[9] 3 R 547/1955.

[10] Austrian Law against Unfair Competition, Section 9 and Section 2, paragraphs 1 and 2.

* Member of the New York Bar.

Digest of Foreign Law Cases

Special Editor: MARTIN DOMKE

American Foreign Law Association

Petition of Ahrens, 138 F. Supp. 70 (D. New Jersey, Feb. 1, 1956): honorable army discharge of denaturalized citizen of German birth as alien, no bar to naturalization.

Archawski v. Hanioti, 76 S. Ct. 617 (April 9, 1956): money paid for passage to Europe on vessel of Honduran registry; suit in nature of indebitatus assumpsit within admiralty jurisdiction if unjust enrichment arose from maritime contract.

Bachman v. Mejias, 1 App. Div. 2d 319 (N. Y. 2d Dept. March 26, 1956): enforcement of Puerto Rican decree on custody of child, power of Puerto Rico court under its decisional law to modify judgment.

Badhwar v. Colorado Fuel and Iron Corp., 138 F. Supp. 595 (S.D.N.Y. Sept. 12, 1955): delay in shipment to India of caustic soda as result of strike under contract CIF Bombay.

Bata v. Bata, 135 N. Y. L. J. Feb. 15, 1956, 6 col. 7: beneficial ownership of land in Brazil; deposits in escrow bank account in Sao Paolo, Brazil.

Bata v. Hill, 119 A. 2d 892 (Ct. Chanc. Del. New Castle County, Dec. 15, 1955): effect of deposition of Dutch Bata shares with Division for Registration of Securities of the Council for Restoration of Civil Rights created by Royal Dutch Decree.

Bello v. Bello, 135 N. Y. L. J. March 5, 1956, 13 col. 1: divorce decree of Commonwealth of Puerto Rico.

Blower, Matter of Emma, dec'd, 135 N. Y. L. J. March 13, 1956, 11 col. 1: renunciation in New South Wales, Australia, of rights under will proved in Chester, England, at residence of deceased; English law on 'double probate'.

Blue v. McKay, 136 F. Supp. 315 (D. Col. June 24, 1955): patent to land issued in 1858, in accordance with Treaty of Guadalupe Hidalgo of 1851, to persons who had held title under Mexican law.

Bochary v. Pan American World Airways, 135 N. Y. L. J. April 23, 1956, 7 col. 7: aircrash in Brazil; proof of Brazilian law on heirship; time limits under Warsaw Convention.

British Transport Commission v. United States, 230 F. 2d 139 (4th Cir. Feb. 13, 1956): exoneration from liability for loss sustained in collision on foggy night in North Sea.

Brock v. Brown, 138 F. Supp. 628 (D. Maryland, Feb. 29, 1956): effect of French publication of patent for 'weeping doll'.

Bunge Corp. v. The Chunchi Ho, 18 F. R. D. 445 (S. D. N. Y. Aug. 10, 1955): damages to tallow delivered for carriage from U.S. to Genoa, Italy; service of libel based on relationship of Panamanian chartering - corporation and manager.

William Bussey (Canada), Ltd. v. Kresch Wool Stock Corp., 135 N. Y. L. J. March 21, 1956, 11 col. 8: taking of testimony of witness in Yokohama, Japan.

Catapodis v. Onassis, 135 N. Y. L. J. April 6, 1956, 7 col. 4: commission for negotiation of 1954 agreement with Saudi Arabia confirmed by Royal Decree; dismissal of previous court action in Paris, France; forum non conveniens for action between residents of France based on alleged contract made in France; application of French law; language problem for witnesses.

Central National Bank of Cleveland v. Brownell, 137 F. Supp. 686 (N. D.

Ohio Jan. 17, 1956): vesting on Jan. 12, 1953 of corpus of public charitable trust held for a Gemeindehaus in Western Germany, not barred by Joint Res. of Oct. 19, 1951 terminating war with Germany.

Chenault v. Nebraska Farm Products, Inc. 138 F. Supp. 772 (D. Nebr. Jan. 25, 1956): identity of foreign (British and Austrian) patents for drying process.

China Sugar Refining Co., Ltd. v. Andersen, Meyer & Co., Ltd., 135 N. Y. L. J. April 13, 1956, 6 col. 7: recovery by Chinese corporation, subsidiary of the Bank of China, of deposit made in 1945 for post-war delivery of machinery; removal of administration to Formosa; transfer of deposit on orders of Communist authorities on mainland of China.

China Union Lines v. Steamship Company of 1949, 136 F. Supp. 597 (S. D. N. Y. Dec. 14, 1955): charterparty of Chinese steamship Chungking Victory providing for arbitration in New York under standard form of 'Time Charter, Government Form.'

Compania Embotelladora Coca-Cola, S. A. v. United States, 24 U. S. Law Week 2491 (Ct. Cl. April 3, 1956): Cuban production tax paid in lieu of Cuban profit tax, under Revolution Law No. 1, sanctioned by President of Cuba on Dec. 31, 1941.

Cook v. Kuljian Corporation, 137 F. Supp. 833 (E. D. Pa. Jan. 6, 1956): contracts for boiler construction in Bokaro, Bihar, India.

De Sairigne v. Gould, 1 A. D. 2d 820 (N. Y. 1st Dep. Feb. 28, 1956): issuance of check in 1944 in enemy-occupied France; effect, if any, of French law not having been considered.

Detres v. Lions Building Corporation, 24 U. S. Law Week 2580 (7th Cir. June 13, 1956): Puerto Rico, since acquiring status of Commonwealth, not deprived of status as 'territory' for purposes of federal jurisdiction.

De Vegvar v. Gillilland, 228 F. 2d 640 (D. C. Cir. Dec. 22, 1955): share in Yugoslav Claims Fund; taking of property in Yugoslavia prior to acquisition of U.S. citizenship; no judicial review of determination of Foreign Settlement Commission under International Claims Settlement Act of 1949, 64 Stat. 13.

Ditman v. Hofferbert, 136 F. Supp. 542 (D. Maryland Dec. 23, 1955): bona fide residence in Saudi Arabia for tax-exemption purpose.

Dravecka v. Cartier, 135 N. Y. L. J. Mar. 9, 1956, 7 col. 6: legal services in administration of estate where counterparts of will executed in Hungary were deposited in France, Hungary and Isle of Jersey, Great Britain.

Dumarsais, Estate of, 135 N. Y. L. J. March 14, 1956, 7 col. 2: distribution in accordance with law of Haiti where decedent resided.

Dyer v. Kazuhisa Abe, 138 F. Supp. 220 (D. Hawaii Feb. 10, 1956): class discrimination in electoral process in Island of Oahu, Territory of Hawaii.

Elephant Butte Irrigation District of New Mexico v. Gatlin, 294 P. 2d 628 (New Mexico Feb. 27. 1956): diversion of river waters to federal game refuge established in aid of migratory bird conventions with Great Britain of 1916 and with Mexico of 1937.

Federal Deposit Insurance Corp. v. Irving Trust Co., 137 F. Supp. 145 (S. D. N. Y. Dec. 15, 1955): cash margin accounts in connection with foreign exchange transactions; foreign branches of N. Y. banks.

Ferrara v. Ferrara, 135 N. Y. L. J. Feb. 14, 1956, 13 col. 8: invalidity of Mexican divorce.

Ferro Metal & Chemical Corp. v. Monrose Smelting Corp., 135 N. Y. L. J. May 11, 1956, 7 col. 7: translations of interrogations in German; sec. 309a N. Y. C. P. A.

Fitzgerald v. Pan American Airways, 229 F. 2d 499 (2d Cir. Jan. 26, 1956): discrimination in Hawaii in airpassage from San Francisco to Sidney, Australia.

Fogorty v. Young, 1 App. Div. 751 (Dec. 24, 1955): disability compensation to non-resident alien, citizen of British West Indies, only half of commuted

amount, under sec. 17, N. Y. Workmen's Compensation Act.

Gantt v. Hurtado & Cia., 286 App. Div. 212, 141 N. Y. S. 2d 738 (1st Dept. June 7, 1955): arbitration clause in lumber sales contract between residents of North Carolina and Nicaragua providing for New York arbitration, governed by N. Y. Arbitration Act.

Gaylor Petroleum Sales Corp. v. Gulf Oil Corp., 135 N. Y. L. J. March 28, 1956, 6 col. 8: oral agreement for commission on sales by Chinese Petroleum Corporation of Kuwait crude oil.

Goodman v. Pan American World Airways, 148 N. Y. S. 2d 353 (Jan. 5, 1956): service in action for damages by airplane crash in Brazil.

Government of Guam v. Kaanehe, 137 F. Supp. 189 (D. Guam, App. Div., Jan. 23, 1956): violation of Guamanian income tax law.

Gruen, Matter of Herbert, 1 Misc. 2d 41 (Surr. Ct. N. Y. County April 27, 1948): deposit of Dutch guilders in French bank affiliate of National City Bank of N. Y.; contemplation of future dealings with money in N. Y. exclude application of French law to transaction.

Hayes Industries v. Watson, 136 F. Supp. 339 (D. Col. Dec. 20, 1955): British and French (prior) patents for improvement in warp beams.

Higa v. Transocean Airlines, 230 F. 2d 780 (Ninth Cir. Dec. 15, 1955): Hawaiian wrongful death statute (Revised Laws of Hawaii § 10 486) not applicable to death on high seas beyond territorial waters.

Hongkong & Shanghai Banking Corp. v. United States, 137 F. Supp. 425 (Ct. Cl. Jan. 31, 1956): requisition of tinplates consigned to Hongkong corporation and discharged on Army orders in Philippines on Dec. 4, 1941; no evidence of appropriation by Army to its own use; loss of property "through the fortunes of war".

Iannone v. Radory Construction Corp., 1 N. Y. 2d 671, 150 N. Y. S. 2d 199 (N. Y. March 15, 1956): workmen's compensation award to decedent's widow and infant daughter, residents of Italy, as less favorable than accorded to U.S. citizens; violation of art. XII of Commercial Treaty with Italy, 63 Stat. 2272.

Matter of Jack's Club & Hotel, Inc., 138 F. Supp. 620 (D. Puerto Rico March 9, 1956): subrogation of Banco de Ponte in place of Puerto Rico Industrial Development Company; construction of sec. 1163–1165 of Civil Code of Puerto Rico.

Kadar, Estate of Gustav, 150 N. Y. S. 2d 263 (Febr. 21, 1956): Discovery proceedings as to assets credited to account of Swiss lawyer in Zurich, Switzerland.

Komlos v. Compagnie Nationale Air France, 18 F. R. D. 363 (S. D. N. Y. June 19, 1955): air crash in the Azores, Portugal; recovery of "moral damages" under Portuguese law.

Kovanen v. Lundgren & Borjjessons Rederier, 135 N. Y. L. J. April 6, 1956, 11 col. 7: injuries incurred by Finnish national while on high seas on Swedish vessel.

Koziol v. The Fylgia, 230 F. 2d 651 (Second Cir. March 7, 1956): injury sustained on Swedish vessel by Polish seaman signing articles in Argentina; application of Swedish law; remedies available in Sweden.

Krichbaum v. United States, 138 F. Supp. 515 (E. D. Tennessee Feb. 16, 1956): non-payment of taxes to Empire of Ethiopia by American employed in road building project in Ethiopia no bar to taxpayer's exemption for salary earned outside U.S.

La Nationale v. Lavan, 135 N. Y. L. J. May 3, 1956, 8 col. 6: English law on seizure of abandoned car and assessment for customs duty; proof by affidavit of solicitor of Supreme Court of Judicature of England.

Leon v. Reichbach, 138 F. Supp. 449 (S. D. N. Y. July 11, 1955): recovery of money received for testator's account from bank in Switzerland.

Lepow v. North Atlantic Fertilizer & Chemical Co., 136 N. Y. L. J. March 14, 1956, 7 col. 7: export of giraffes

from Kenya to New York; failure to obtain 'zoo letter' and permit of Government of Kenya.

Lesser v. Chevalier, 138 F. Supp. 330 (S. D. N. Y. Feb. 16, 1956): forum non conveniens in action for breach of television contracts by citizen of France.

Lowe v. United States, 230 F. 2d 664 (9th Cir. March 5, 1956): status of Chinese treaty merchants; Treaty of 1880, 22 Stat. 827.

Ludvigsen v. Commercial Stevedoring Co., 228 F. 2d 707 (2d Cir. Jan. 3, 1956): expenses for witness brought from Oslo, Norway.

Madison Pictures v. Pictorial Films, 135 N. Y. L. J. Febr. 24, 1956, 7 col. 8: world-wide distribution and exploitation rights of motion pictures owned by Pathe.

Mafnas v. Government of Guam, 228 F. 2d 283 (9th Dec. 19, 1955): law of Guam on involuntary manslaughter before enactment of Organic Act of Guam, 64 Stat. 384.

Maltese, Matter of Francesco, 135 N. Y. L. J. April 9, 1956, 12 col. 6: requirements for execution of will under Italian law.

McQuade v. Sztykgold, 1 A. D. 2d 872, 149 N. Y. S. 2d 378 (1st Dept. March 13, 1956): examination of witness in Germany; German law on appointment of receiver.

Miss v. Compex Chemical Co., Inc. 135 N. Y. L. J. April 24, 1956, 8 col. 8: employment from 1948 in Shanghai, China; no frustration because of business interference by Communist authorities; no recovery of expenses in action before People's Court of Shanghai for collection of debts of defendent's customers.

Mitchell v. Rogers, 138 F. Supp. 214 (D. Hawaii Feb. 16, 1956): collection of delinquent account by residents of Honolulu, Hawaii; application of Fair Labor Standards Act of 1938.

Molinos v. S.S. Rio Grande, 1956 A. M. C. 199 (E. D. Virginia Feb. 26, 1955): forfeiture of wages under Labor Code of Panama.

Morgan v. Drewry, 135 N. Y. L. J. March 9, 1956, 7 col. 3: recovery for N. Y. attorney's services rendered for British corporation which had made settlement in England with Onassis against whom judgments had been obtained in English courts.

Mulvehill v. Furness, Withy & Co., Ltd., 136 F. Supp. 201 (S. D. N. Y. Nov. 14, 1955): passage ticket on English vessel (S.S. Ocean Monarch) providing for application of English law; time limitation of one year binding upon American buyer commencing voyage in American port for Bermuda.

Nakken v. Fearnley & Eger, 137 F. Supp. 280 (S. D. N. Y. Aug. 9, 1955): Norwegian law governing injury claim of Norwegian seamen against Norwegian shipowner-partnership, even though injury occurred in Brooklyn, N. Y.; New York was place of signing articles and shipowner operated corporation doing business there; disability claim to be made at Norwegian Consulate.

Nerculas, Estate of George, 135 N. Y. L. J. Feb. 6, 1956, 8 col. 1: distribution in accordance with the laws of Greece.

New York & Honduras Rosario Mining Co. v. Riddle Airlines, 135 N. Y. L. J. April 10, 1956, 7 col. 8: loss of gold shipment delivered to foreign air carrier in San Salvador, Honduras.

Nolan v. Nolan, 135 N. Y. L. J. May 3, 1956, 13 col. 7: no recognition of Mexican mail-order divorce.

Panama Canal Company v. M.S. Lisholt, 1946 A. M. C. 498 (D. Canal Zone, Feb. 2, 1956): tolling of statute of limitation under sec. 102 of Title 5 of Canal Zone Code; plaintiff as agent or instrumentality or corporate agency of U.S.; no maritime lien for wrongful death under law of Canal Zone.

Pasos v. Pan American Airways, 229 F. 2d 271 (2d Cir. Jan. 23, 1956): alleged unlawful use of land in Nicaragua; 'physical' acts by government of Nicaragua not reviewable in courts of U.S.

Pavlakis v. Seacrest Shipping Co., 136 F. Supp. 553 (D. Maryland, Dec. 21, 1955): injury by Greek national

against Panamian owner of vessel registered in Liberia.

Pennington v. Government of Guam, 228 F. 2d (9th Cir. Dec. 19, 1955): no retroactive effect of amendment of Guam Organic Act to criminal proceedings.

Potter, John E. P. Co., Ltd., v. Miller-Metal Corp., 149 N. Y. S. 2d 641 (Feb. 7, 1956): arbitration of dispute regarding shipment to Portugal under sales-contract 'FOB Japan'.

Ramey v. United States, 230 F. 2d 171 (5th Cir. Feb. 23, 1956): money taken by fraud in Nuevo Laredo, Mexico; proof of conspiracy for establishment of federal jurisdiction.

Refrigeradora Del Noroeste, S. A. v. Appelbaum, 138 F. Supp. 354 (N. D. Illinois Feb. 10, 1956): breach of contract for distributing Mexican shrimp in U.S. and Canada.

Robinson v. Northeastern Steamship Corp., 228 F. 2d 679 (2d Cir. Jan. 5, 1956): intoxicated seamen's death in Buenaventura, Colombia.

Ruffolo, Estate of Teresina, 135 N. Y. L. J. Febr. 24, 1956, 11 col. 2: execution of will in conformity with Italian law.

Rutkin v. Reinfeld, 229 F. 2d 248 (2d Cir. Jan. 25, 1956): purchase by bootlegging partnership, prior to 1933 repeal, of interest in Canadian distillery.

Savelis v. Vlachos, 137 F. Supp. 389 (E. D. Virginia Nov. 25, 1955): Greek seamen as wards of court; International Convention for Safety of Life at Sea.

Sauget v. Villagomez, 228 F. 2d 374 (9th Dec. 19, 1955): purchase of property rights in land known to Spanish law formerly applicable to Guam and corresponding to common law easement.

Scanlon, Matter of Catherine, 135 N. Y. L. J. Mar. 7, 1956, 11 col. 4: compensation of services of Consul General of Ireland as successor ancillary executor.

Schiff v. Schiff, 135 N. Y. L. J. Feb. 27, 1956, 11 col. 6: invalidity of Mexican divorce decree.

Schneider, Estate of Louise S., Cal. App. 2d App. Div. Civ. No. 21469, April 12, 1956: reciprocal rights of inheritance existing between citizens of U.S. and Germany as of March 31, 1945 (date of death); sec. 259 Cal. Probl. Code.

Schumer v. Hamburger & Co.'s Bankierskantoor, N. V., 135 N. Y. L. J. Feb. 9, 1956, 6 col. 3: deposition to be taken in the Netherlands.

Schwartz v. Schwartz, 135 N. Y. L. J. March 9, 1956, 9 col. 2: Mexican mail-order divorce.

Schwarz v. Schwarz, 135 N. Y. L. J. March 1, 1956, 10 col. 7: charges, in separation proceedings, of 'conspiracies under the Nazi regime.'

Schwob v. International Water Corp., 136 F. Supp. 310 (D. Del. Nov. 10, 1955): French engineer as alleged exclusive agent for negotiations with Israeli administration on construction of groundwater wells.

Serrales v. Viader, 149 N. Y. S. 2d 175 (Sup. Ct. Nov. 18, 1954): no refusal of N. Y. jurisdiction in paternity action because all parties were citizens of Puerto Rico; pendency of proceedings in Supreme Court of Puerto Rico.

Sinai v. Levi, 135 N. Y. L. J. March 6, 7 col. 7: prescription of rights in negotiable instrument under Civil Code of Italy.

Smith America Corp. v. Bendix Aviation Corp., 140 F. Supp. 46 (D. Col. Febr. 17, 1956): British Government's authorization for use of British companies' American patents without payment of royalties; validity of World War II release by British Govt.; no political question in suit of British companies for royalties from American licensee.

Société Marocaine Des Etablissements P. Parrenin v. Gardner-Denver Company, 137 F. Supp. 210 (S. D. N. Y. Jan. 13, 1956): contract between army and contractor for air bases in French Morocco; exclusive distribution of machinery in French Morocco; effect of secrecy of Government project.

Sojo v. Sojo, 135 N. Y. L. J. Feb. 23, 1956, 11 col. 4: legality of proxy marriage under law of Argentina; judicial

notice pursuant to sec. 344a N. Y. C. P. A.

Southwestern Sugar & Molasses Co. v. The Eliza Jane Nicholson, 138 F. Supp. 1 (S. D. N. Y. Feb. 16, 1956): carriage of cargo from Antwerp, Belgium, or Vlarrdingen, Netherlands, to a U.S. North Hatteras port.

Standard Pharmaceutical Co. v. Oxford Chemical Corp., 135 N. Y. L. J., Feb. 14, 1956 8 col. 7: unauthorized appropriation of trademark in selling goods to Formosa.

Stein, Hall & Co. v. Sealand Dock & Terminal Corp., 149 N. Y. S. 2d 537 (Feb. 20, 1956): non-delivery of tapioca flour imported from Brazil through collapse of pier.

Swan, Estate of Oei Tjong, 135 N. Y. L. J. April 9, 1956, 8 col. 2: validity of family foundations established in Switzerland and Liechtenstein; effect of wartime restrictions on foreign funds of Dutch national residing in France.

Szczygiel v. Isthmian Steamship Company, 1 N. Y. 2d 669, 150 N. Y. S. 2d 198 (N. Y. March 15, 1956): injuries sustained on vessel enroute to Halifax, Nova Scotia, Canada.

Tamas, Estate of Mary, 135 N. Y. L. J. Feb. 7, 1956, 7 col. 4: challenge of authenticity of powers of attorney of Vice Consul of Hungarian Peoples Republic not sustained in accounting procedure.

Tennyson v. Sayler, 66 N. W. 2d 393 (South Dakota Oct. 22, 1954): Presidential Proclamation No. 2974 of April 28, 1952 did not intend to proclaim termination of World War II but only "termination of certain described emergencies" (p. 396), namely under proclamations of Sept. 8, 1939 and May 27, 1941, upon entry into force of Peace Treaty with Japan.

Matter of Terry, 1 Misc. 2d 450 (Surr. Ct. Suffolk County Nov. 1, 1955): no jurisdiction over lands in Denmark owned by intestate decedent of New York residence.

Trykowski v. Trykowski, 135 N. Y. L. J. March 7, 1956, 12 col. 3: annulment of marriage performed in 1937 in Gdynia, Poland, of Polish nationals residing in Poland; representation by Chief of Consular Section of Polish Peoples Republic in Washington.

Turkish State Railways Administration v. Vulcan Iron Works, 136 F. Supp. 622 (M. D. Pa. June 8, 1955): arbitration agreement with agency of Turkish government "as to elucidation or interpretation" of contract for manufacture of locomotives.

Two World Trading Corp. v. Loew's Internat. Corp., 135 N. Y. L. J. Feb. 17, 1956, 7 col. 6: statute of limitations under contract providing for delivery of goods in Italy.

United States v. American Trading Co. of San Francisco, 138 F. Supp. 536 (N. D. Cal. Feb. 9, 1956): overpayment of freight charges for U.S. Navy cargo for shipment from San Francisco to Pago Pago, Samoa, and to Suva, Fiji.

United States v. Bazan, 228 F. 2d 455 (D. Col. Dec. 1, 1955): exemption of Spanish national from military service, to debar alien from citizenship, requires also that he was relieved from service for that reason.

United States v. Borax, 11,020 Bags, 137 F. Supp. 216 (E. D. N. Y. Jan 11, 1956): forfeiture of goods seized for violation of Export Control Act of 1949, 50 U. S. C. A. App. sec. 2021.

United States v. Kinsella, 137 F. Supp. 806 (S. D. W. Va. Jan. 16, 1956): jurisdiction of court martial in Tokyo, Japan, for conviction of civilian, Mrs. Smith, of murder of her husband, colonel in U.S. Army.

United States v. Standard Oil Co., 136 F. Supp. 345 (S. D. N. Y. Dec. 14, 1955): recovery of excessive prices in sales of Arabian crude oil to private importers in Europe; alleged disqualification of lawfirm whose member had been government counsel for Paris office of Economic Cooperation Administration.

Volynsky v. United States Plywood Corp., 135 N. Y. L. J. May 11, 1956, 7 col.

1: contract with French company for construction of plant in Africa for production of plywood.

von Clemm, In re, 229 F. 2d 441 (Ct. Customs and Pat. App. Dec. 8, 1955): exclusion order in importation of German synthetic stones.

Western Canada Steamship Co., v. U.S., 1955 A. M. C. 205 (W. D. Wash. Sept. 19, 1955): effect of Korean War on delivery of vessel delayed in discharging in Japanese ports.

Zymslinski v. Zymslinski, 135 N. Y. L. J. April 6, 1956, 8 col. 1: marriage in Germany by Polish inhabitants of Displaced Persons camp.

Book Reviews

MITCHELL, J. D. B. *The Contracts of Public Authorities. A Comparative Study.* The London School of Economics and Political Science (University of London). London: G. Bell & Sons, Ltd., 1954. Pp. xxxii, 256.

The author, professor of constitutional law at the University of Edinburgh, wrote this work as a doctoral thesis in philosophy at the University of London. It treats the problem of contract as an instrument of public administration, first, in three selected countries (two common-law countries, England and the United States, and a continental system, France), and then comparatively. Thus, on the one hand, he makes accessible to continental comparatists the relatively little-known Anglo-American solutions; on the other hand, he enlightens English-speaking jurists, specially trained in the common law, on the French solutions. The two tasks, though difficult, are accomplished in an exemplary manner. This is a service of primary importance for scientific knowledge. But he also adds a synthesis, which we observe at once, is truly magistral.

At first glance, it might be believed, and indeed it has long been thought on both sides of the Channel and across the Atlantic, that this problem, like so many others, in the very nature of things should be resolved quite differently by the common law and under the French *régime administratif*. The author shows that jurisprudential solutions everywhere, in the last analysis, are undoubtedly related, and the tendencies are analogous. It also has been thought on the Continent (and in this the influence of Dicey was material) that, in such contractual situations, the common law tends first of all to protect individuals against the state, whereas the *régime administratif*, by allowing administrative privilege, sacrifices private rights to the public welfare. The author proves the contrary; it is the common law which recognizes the necessity of ensuring real effective administrative action rather than to protect at any cost and against anything the principles of the "sanctity of contracts"; on the other hand, French administrative law—by the orientation given it by the jurisprudence of the Conseil d'État—guarantees to individuals a just indemnity whenever their contractual rights are unilaterally infringed. The European jurist is inclined to think that the contract in common law is a unitary legal institution, governed by jurisprudential rules that continue uniform in principle; the Anglo-American jurist in turn regards French administrative law as written law whose principles must be found in legislative enactment. Now, the author demonstrates that under the common law contracts entered into by public authorities are more and more differentiated, becoming an institution *sui generis*, and are treated by the courts as such; on the other hand, in French law, in spite of the silence of the legislator, "judge-made law" creates rules for "public law" compensation, the role of the judge being no less significant than in the former system (although different) in establishing a dynamic equilibrium between community and individual. One might continue at length this comparison of

apparently justified illusions, and the reality presented by Mr. Mitchell could be pursued much further. In this lies the interest of this fine book, always instructive, precise, substantial in content, perfect in method, and which, with undeniable weight, is never heavy.

Every conflict between the individual right of the citizen and the public welfare, between the theoretical approach and practical necessity, between the respect due to the benevolent undertakings of contracting parties and the postulate of efficient administrative action, certainly merits the attention of the jurist. A review of the decisions proves that doctrinal positions inevitably collapse under the assault of life. The essential problem is consequently transposed: it involves less the preservation of the rule "*pacta sunt servanda*," than of causing the mechanism of compensation to function whenever the private contracting party (even in the relationship between the civil servant and the state-employer) suffers damage as a result of unilateral modification or breach of the contract. The celebrated constructions of the French Conseil d'État, like that of *l'imprévision*, or *fait du prince*, indicate the way. If in the common-law countries solutions are still uncertain and do not offer sufficient security for legal commerce, as Mr. Mitchell states, the eventual development of public law, duly projected and pursued, can lead to a decisive improvement of the situation. We are far from the mistrust of Dicey and his school towards administrative law and the French system.

GEORGES LANGROD*

*Professor of Law, University of the Saar.

FRIEDMANN, W. (editor) *The Public Corporation. A Comparative Symposium.* With a preface by Dean Cecil A. Wright. University of Toronto School of Law Comparative Law Studies, Volume I. Toronto: The Carswell Co. Ltd., 1954. Pp. vi, 612.

The Law School of the University of Toronto presents the initial volume of its new series devoted to the comparative study of modern legal institutions. As Dean Wright states in the preface:

> "Under present world conditions, to ignore the progress of law in any country is not merely to deny the immediate community that lawyers serve the opportunity of profiting by the experience and errors of others—a luxury of days gone by—but to court disaster both from within and without, by failing to understand the common problems of world neighbours, and by ignoring the hopes and aspirations of world citizens as expressed through the medium of law."

Thus in a few words, the program of comparative legal science is restated and this in a country which by force of circumstances offers an admirable field for constant internal comparisons and where nonetheless comparative law has been generally neglected in the program of university research and instruction. It is precisely the study of comparative law that gives the jurist a better perspective to analyze his own legal system and abolishes the barriers of mutual misunderstanding and mistrust.

It is appropriate to salute this deserving venture as warmly as it merits, the more so as the first volume of the series, edited by Professor W. Friedmann, universally known comparatist (and who is, in addition, the sole author of the final comparative analysis ((pp. 539–593)) and the chapter on Great Britain, as well as co-author of the chapter on Germany), may be considered a model of methodology.

The volume contains four parts. The first includes fourteen parallel monographs in which the most competent authors examine their own law (with two exceptions: Mr. Friedmann and Mr. Hazard, author of the chapter on the USSR); these are succinct but perfectly clear analyses, designed not to compare, but to give the reader a valuable documentation, as complete and current as possible, taking account of legislative, jurisprudential, and doctrinal solutions, and—what deserves emphasis—following a common plan. The reader, whether jurist, administrator, political scientist, or even economist, thus obtains a live picture of the dynamic situation as it exists in the thirteen most representative countries in the plan; starting from this, a fruitful comparison appears possible.

The second part is not, like the preceding, devoted to description, but to a "functional" study relating to a well-chosen "public corporation" (viz., the British National Coal Board). The reader thus can observe, from within, a typical case in operation, its real activity, the functioning of its machinery, treated by an author who, because of his own experience, is able to cast special light on the subject. It is difficult to find a better illustration of initial descriptive analyses. This example should be considered by future authors of analogous comparative studies.

In the third part, Mr. Parry treats the international "public corporation" as one of the major instruments of future economic development.

Finally, in the fourth and last part, which is truly comparative, the editor draws comparative conclusions from the monographic studies, successively reviewing the motives and ends of "public corporations," their three principal types, their various legal aspects (from the point of view of private and public law), the problem of their control by the state, etc.

From the viewpoint of method, this is an achievement whose importance surpasses the scope of the matter studied. It is indeed rare to find a collective study so well conceived, in such a degree following a uniform conceptual and semantic scheme, crowned by so clear and profound a methodical confrontation of ideas and practical solutions. Mr. Friedmann and his collaborators have the great merit of showing us how such a task is to be accomplished despite the various apparent difficulties; by way of illustration, the Anglo-American notion of "public corporation" (enterprise, undertaking) cannot be applied indiscriminately, for instance in France (where we speak of "*l'entreprise publique*" or, more narrowly, of "*l'établissement publique*"), or in Germany (where the "*öffentliche Körperschaft*" has a different, much more restricted meaning). In practical usage, in various languages, the meaning of "public corporation"

(even in English) is limited to purely economic functions, to the exclusion of others (*cf.*, for example, Encyclopedia Britannica, 1955 ed., vol. 10, p. 571). According to the classical scheme of French administrative law, all administrative bodies of an autonomous nature (*désintegrées*) are not grouped (together with the phenomena of "*décentralisation par service*") under the same rubric, as is the case in Germany or Austria. A whole series of other basic disparities between co-existent systems could be noted. The authors and the editor have succeeded in isolating the fundamental lines of the problem appearing everywhere in an analogous manner, and in demonstrating precisely this analogy. They penetrate diversities to reach similarities. This model of methodology should be followed and improved upon by comparative undertakings (particularly those relating to public law or public administration) in the future. For example, while the second part requires a sort of "introspection" and consequently should be done by someone "on the inside," the first descriptive part might perhaps have gained by collaboration between a foreign and a native jurist. Such an approach "from without" would contribute even more to enrich each analysis, to harmonize the whole, and to make a successful final comparison (at the same time respecting the type-pattern of all comparison: first, study of foreign law, then "isomorphic" comparison).

As for the nature of the topic studied, namely, "public corporations," this fully deserved such a serious treatment. In the present state of national laws and of the law of international organizations, this is a vague and most fugitive notion, still generally devoid of precise legal content, and yet universally applied. Confusing private law conceptions (which primarily are applied in this field everywhere, even in continental legal systems), at the same time it breaches the traditional structure of "regular" public administrations, deforming and superseding the classical schemes of administrative law. Regrettable jurisprudential doctrinal confusion ensues everywhere, the legislator employing this form of administrative action for opportunistic reasons, adopting different solutions from case to case (whether "government departments," "joint stock companies," or finally—and this form deserves special attention—the "public corporation proper"). It is literally impossible, without resorting to comparisons, to grasp the broad lines of the general evolution and the trends of doctrine and practice; everywhere, on the national level, "it is the trees that hide the forest." Thanks to an ingenious comparison of different national solutions and an effort at comprehensive synthesis, the comparative analysis of Professor Friedmann opens new and sometimes unexpected perspectives. Note in particular the proof that he advances of the subordinate role of ideological considerations, the real motive of these creations being economic, technical, and administrative; or the interest of comparison with the Eastern solutions on the Soviet pattern (where "public corporations" have assumed progressively prime importance); or finally the general rejection by Anglo-American countries of the state "joint stock company" and even of any "société d'économie mixte," the rise of which characterized in a degree the continental European countries between the two wars, etc.

It is impossible to take due account of the contents and the rich conclusions of this book, replete with varied, thought-provoking lessons, without retracing the authors' contributions; only in the reading (which, contrary to what might at first be thought, is easy and nowise repellent) can its value be fully appreciated. It is bound in consequence to stimulate intensive studies, both in order to define new comparative characteristics and to include, as objects of comparison, other countries and regions of the world. Thus, for example, the Latin-American "autarchies," to which a rich literature has already been devoted (especially in Argentina and Brazil), or the Portuguese "*estabelecimentos públicos*" and the "*institutos públicos*" of Spain, would fully deserve consideration in this view. If ever the effective role of the "public corporation" *lato sensu* in the legal system and in modern administrative mechanism were to be seriously clarified, comparatively speaking, if—thanks to such studies—the mission of the "public corporation" on the international level (especially in its operation in underdeveloped countries) appears in full light, the work edited by Mr. Friedmann will have the credit of having been the pioneer and the precursor.

GEORGES LANGROD*

*Professor of Law, University of the Saar.

VERDROSS, A. *Völkerrecht*. No. 10, Rechts- und Staatswissenschaften. Third revised and enlarged edition. Wien: Springer Verlag, 1955. Pp. xix, 546.

STARKE, J. G. *An Introduction to International Law*. Third edition. London: Butterworth & Co. (Publishers) Ltd., 1954. Pp. xx, 485. Index, pp. 28.

Each of these books has already won world-wide reputation, that of Verdross as a standard work encompassing the whole system of international law in a single volume, and that of Starke as an introduction, written from the point of view of the practitioner, in a felicitous style so as to make it most useful to specialists, the legal profession in general, the student, and the general public.

The new editions have been brought up-to-date. Thus, Verdross has added new chapters on the basic norm of international law, the principle of *bona fides*, effectivity, jurisdiction of the United Nations, supra-national unions, protection of victims of war, international criminal law, etc. Starke has added a chapter on Succession and sections on Asylum, Human Rights, International Tribunals and the Operation of Municipal Law. He has taken account of the emergence of new principles as regards, for example, the law of the territorial sea, war, neutrality, and economic warfare.

On the all-important question of the relation between national and international law, Verdross adopts the position of *tempered* and *articulated monism* on the basis of international law. Radical monism is rejected because national law is not invalid merely because contrary to international law; dualism is rejected because the separation of the two is never complete, since the binding force of national law in conflict with international law is merely operative within the state and only temporarily so, pending the settlement of the dispute according to international law (63). Starke's position is not markedly different from this. As a result, the doctrine of "transformation" loses the significance

it has for dualism. A national constitution is all-powerful as regards internal effects but powerless as regards external effects: it can neither bestow upon international law external binding force nor deprive it of such force. Here Verdross recalls the deletion, thanks to his intervention, of some misleading wording from the draft of the Weimar Constitution. Yet he admits that international law has primacy in the *normative* sense only, while the *effectivity* of such primacy depends on the existence of truly compulsory jurisdiction of international tribunals (72).

Starke believes that "there is no question that, however exceptionally, many modern treaties bestow rights or impose duties upon individuals" (52). Verdross points out, however, that only where the individual is responsible under international law *immediately*, and not only under national law implementing the former, is he subject to an international legal duty. This applies to war criminals only (114). Similarly, legal rights are international only if internationally effective (117). Later, Verdross adds further examples of true international duties of individuals. Genocide will become an individual crime *immediately* under international law (and not only "*delictum iuris gentium*" like piracy) when prosecution before an international criminal court becomes available. In the same way, enslavement (*Pohl*), mass expulsion and forcible deportation (*Altstötter*), euthanasia and medical experiments on prisoners (*Brandt*) could be made crimes under international law *immediately*, the same as the Nuremberg tribunals treated the cases enumerated as crimes against humanity (511).

In the key-problem of recognition, Starke believes the truth lies somewhere between the constitutive and declaratory (or evidentiary) theory, but international practice supports the latter. He notes, however, a tendency towards nonrecognition of changes brought about by wars of gross aggression. Verdross thinks recognition itself is declarative in the case of a new state, but constitutive as regards the belligerent rights of insurgents. He observes a tendency to recognize insurgency short of belligerency, even to give some consideration to nonrecognized insurgency. The principle of nonintervention, in this view, clearly favors recognition of insurgents when in civil war the legal government no longer represents the whole nation. Yet he admits that state practice is far from drawing the obvious conclusion. It is also noteworthy that Kelsen, Lauterpacht, Guggenheim and others, have abandoned the declaratory theory and adopted the constitutive theory of recognition, which seems to accord better with the normative interpretation of the pure theory of law.

As to method, Starke excels in sketching rules and doctrines in the light of cases before both national and international tribunals. With a few words, he makes intelligible both the carefully selected leading cases and the extent to which they verify the rules, thus felicitously applying the *inductive* method. Verdross frequently uses the opposite method of first *deducing* a guiding principle as regards, for instance, basic rights, status of aliens, delict, laws of war, prize, *etc.*, and then illustrating it by quoted cases to which the principle ap-

plies, as well as distinguishing the exceptions. Thus, the first method saves the effort which the second invites the reader to make: to look up the cases for himself in order to form his own opinion about verification.

Both authors end their books with the intriguing problem of the relation between international law and organization. Verdross elaborates the point that the law of the United Nations is *derived* from general international law and, accordingly, whenever the former breaks down, the latter is *controlling*. Starke is mainly interested in the question how international institutions come within the range of international law or contribute towards its development. The result is understandably meager, owing in part to the present deadlock and in part to the stark contrast of norms and facts in this field. Starke frankly admits the difficulty of distinguishing such aspects as directly concern the international lawyer from those of administrative significance only (427). Verdross, with even greater clarity, explains the weakness of international organization, which still resolves most of its law into politics. On the one hand, the general prohibition in Article 2 of the Charter on "*the threat or use of force*" clearly establishes as valid law the principle: *ex injuria jus non oritur*. Consequently, all occupation of territory or change in political status, brought about in this way, is without effect at law (515). Yet on the other hand, the Charter prohibits selfhelp *without* substituting for it a legal procedure by means of which a state could vindicate its legal claim even against the will of another (519). Verdross concludes that, since the community of nations is so weakly organized, and its supreme political organization so easily paralyzed, respect for law in the ultimate analysis is not assured by sanctions but only by goodwill, moral support, that *bona fides* without which Bynkershoek already has said that the law of nations collapses (529–530).

This, indeed, is the basic idea of Verdross' doctrine, a tempered version of natural law, as distinguished from *philosophical*, but not necessarily from *empirical*, legal positivism (18). It is understandable, then, that he prefers the anthropological type of natural law (based upon the unadorned nature of man) to the law of reason elaborated *ope solius rationis* (Pufendorf). Starke adopts the "standpoint of simplicity" in order to dissipate the "unnecessary complexities of theoretical analysis" (29). In a few words he points out the merits and demerits of both natural law doctrine and of positivism, the latter understood in the specific international legal sense of the *consent* theory. Natural law doctrine has generated respect for international law and provided a moral and ethical foundation for its growth; but it lacked precision, tended to be subjective, and held aloof from the actual practice of states from which most of the rules have sprung (23). Positivism led to a more realistic outlook by emphasizing the rules which states do in fact observe (this applies to its wider sense), while its main defect was the fallacy that consensual manifestation was necessary before international law could operate (this applies to positivism in the narrow international legal sense). When Starke shows that "lack of organized external force" is nothing exceptional and cites the example of

Canon Law, drawing a parallel between Catholic society abiding by its rules and states insisting on their rights as against other states, he comes close to Verdross' view and does not find any essential difference between the binding force of international law and the obligatory character of law in general (29).

BARNA HORVATH*

*Visiting Professor, The Graduate Faculty, The New School for Social Research.

KERN, E. *Geschichte des Gerichtsverfassungsrechts*. München und Berlin: Verlag C. H. Beck, 1954. Pp. xv, 325.

MENGER, CH.-F. *System des verwaltungsgerichtlichen Rechtsschutzes*. Tübingen: J. C. B. Mohr (Paul Siebeck), 1954. Pp. xxiv, 262.

The first volume, devoted to the history of German judicial organization, recognizes that the organization of the judiciary is part of the constitutional framework of each country, as well as the foundation of the procedures of its courts. Exemplifying the importance of the approach from the distant historical past, the work starts with an excellent and concise summary of the judicial procedures of the earliest periods. Many of the concepts and problems of present German judicial organization originated in the fifth century and the times of Charlemagne; the bases of judicial independence and the protection of the individual were established in such early landmarks as the *Reichskammergericht* and the *Reichshofrat* in the fifteenth century. In contrast to the elaborate treatment given to these developments and to the periods from the French Revolution to World War II, the recent developments since its end are quite briefly treated. According to the author, the period since 1945 is too short and its features still too unstabilized to be set within the frame of legal history.

The development of German judicial organization reflects the prevailing historical, social, and economic conditions, in the light of which the main features of the organization and procedures of the German courts are explained: public participation in the administration of justice, independence of the judiciary, and the forms of judicial review. Thus, the *Schöffengerichte*, cerated by the first federal statute on judicial organization, the *Gerichtsverfassungsgesetz* of the German *Reich* (1871–1918), which since 1924 have also absorbed the function of the *Schwurgerichte* in cases of felony, were remnants of the times of Charlemagne, when the king and the few elected pious and honorable men, bound by their oaths, administered justice.

On the other hand, the influence of Roman law, as revived in the Northern Italian city states, and received in Germany as the *Pandektenrecht*, a mixture of Roman, Germanic, and canon law elements, was evident as early as the thirteenth century in the creation of a legally trained judiciary, the separation of civil from criminal cases, and the substitution of written for oral proceedings. Similarly, the ideas of Montesquieu and the events of the French Revolution led to the era of German liberalism. This, in turn, marked the break with the absolutistic powers of the sovereigns of the seventeenth and eighteenth cen-

turies, and initiated the first definite formulation of the ideas of *Rechtsstaat* and *Justizstaat*, or in other words, of a form of government in which, under the separation of powers, an independent judiciary controls the legislative and executive branches and individuals through law. These were the basic ideas of the constitutions of the German *Länder*, all of which showed British and French influence and determined the legislative work of the *Deutscher Bund* (1815–1866) and the *Norddeutscher Bund* (1867–1870). These ideas found general acceptance in the federal statute on judicial organization for the German Empire, the *Gerichtsverfassungsgesetz für das Deutsche Reich*, which came into force on October 1, 1879. The most important provisions of this statute were incorporated in the Weimar Constitution, with the important addition of provisions for a *Staatsgerichtshof*, a court to decide problems of constitutional law, and special administrative courts to protect the individual against government interference through administrative acts. This method was thought to be more effective than review of executive acts by the ordinary courts of justice.

The last part of the book deals with the developments after World War II, with special regard to the provisions of the Bonn Constitution. The author remarks that the control of the Occupation Powers over the administration of justice, to an extent unknown to the concepts of international law prior to World War I, did not impede the legal development of the German *Länder* henceforth not subject to federal control. The Bonn Constitution and the federal statute on judicial organization, the latter in force since October 1, 1950, do provide, however, for federal control; in accordance with Article 93 of the Constitution, the Bundesverfassungsgericht exercises control over the highest executive organs of the federal government and determines the constitutionality of state laws. Matters of public administration are under the general jurisdiction of administrative courts; this in contrast to the previous practice of fixing their jurisdiction by the enumeration of matters within their competence. The Federal Administrative Supreme Court provided for in the Bonn Constitution, however, has not been established to date. It should be added that this survey of postwar developments in judicial administration in Germany includes only the German Federal Republic, not the communist-controlled East German regime. The author, however, does also give a brief review of the judicial organization of that regime.

A bibliography preceding every chapter and a carefully prepared alphabetical index at the end of the book highly contribute to its value.

The work of Professor Menger is a thorough treatment of the substantive legal and procedural aspects of the present system of administrative courts in Germany and their functions of judicial protection. There are exhaustive references to the German federal and state statutes, to the decisions and decrees of the former Occupying Powers, and to the various drafts of 1950–1952 of a Code of Procedure for the Federal German Administrative Court and the German Federal Code of Civil Procedure. Attention is also given to the

decisions of the German state and federal courts, including the Federal Constitutional Court, the *Bundesverfassungsgericht*, and to a lesser degree, to the Austrian Administrative Court.

The judicial functions of German administrative courts are examined as related to the civil courts of justice in the adjudication and the review of administrative litigation and the review of the constitutionality of administrative acts and decrees. These problems are closely connected with the place assigned to administrative courts within the separate branches of government, viz., whether they should be regarded as part of the executive or of the judiciary. In this respect, the author is in agreement with the latest legislative developments in Germany, according to which administrative courts form part of the judiciary and as such have general jurisdiction over matters of public administration. This development is a departure from the former German system, based upon the law of Prussia, in which administrative courts were part of the executive and were granted jurisdiction merely in particular types of cases enumerated in statutes.

Comparison of the judicial functions of administrative tribunals with those of the civil courts reveals certain similarities as well as differences. Thus, the standing of the parties before the court is identical in both types of tribunals; the individual who contests the administrative act or decision is in the same subordinate position as the organ of public administration that issued the contested act or decision, and the decision of the court is equally binding on both. Thus, from a functional standpoint, administrative tribunals are like civil courts of appeal, with the difference, however, that the latter review decisions of the civil courts, whereas administrative tribunals review the legality of acts (*Rechtspflege*) of administrative agencies. In this connection, it should be noted that such acts of administrative organs are binding, unless and until contested by the interested party following the procedural requirements of judicial revision and within the period of limitation prescribed by law.

The review functions of administrative tribunals and civil courts differ, however, in the substance of their decisions, because as a rule administrative review is limited merely to affirmance or reversal of the contested administrative act without going into the merits of the case. In some instances, however, the judgments of administrative courts may effect certain substantive changes, for instance, regarding the amount to be awarded, or the acts to be performed. In this connection, the more liberal provisions of the Austrian law, also briefly indicated by the author, are of interest, as well as the practice of the Hungarian Supreme Court of Administration, which, until its abolition by the Communist regime in 1949, acting as a special branch of the judiciary, decided upon the merits of the given case in addition to affirming or reversing the decision on the ground of the correct application of the law.

Review of the constitutionality of statutes is treated in connection with the particular types of cases pertaining to the jurisdiction of German administra-

tive courts. Only the Federal Constitutional Court, the *Bundesverfassungsgericht*, exercises a general power of review; administrative courts review only the legality of administrative acts and decrees in the particular contested case. In addition, in the former American zone of occupation, administrative courts are invested with the power to annul or to declare illegal certain dispositions which do not have the force of enacted law.

It is to be regretted that the author did not include a comparative treatment of administrative adjudication in the neighboring European countries. Thus, for instance, a comparative reference to certain types of cases developed by the French Conseil d'État, both in substance and procedure similar to the German case material, particularly instances in which the silence of the administrative organs, the *silence de l'administration*, gives rise to litigation in the particular case, would be valuable.

In the above-mentioned types of case law, the functions of German administrative courts concern either a positive act or the omission of an act by an administrative authority. In a further group of cases, administrative courts have primary jurisdiction to adjudicate directly obligations or performances within the sphere of public law. In the treatment of these, Professor Menger emphasizes that the activities of administrative courts show a greater similarity to those of civil courts than in their function of supervising the acts and decisions of administrative organs. This area of primary jurisdiction, however, offers relatively few comparative aspects of importance.

IMRE NEMETHY*

*Former Justice of the Administrative Supreme Court of Hungary; former Member of the Legislative Drafting Staff of the Hungarian Ministry of Justice.

MORRIS, J. H. C. AND LEACH, W. B. *The Rule against Perpetuities*. London: Stevens & Sons, Ltd., 1956. Pp. xlvii, 336.

This book is essentially a comparative study of the English and American law of perpetuities, prepared primarily for the English reader. As the authors state, "We have cited all the English, Irish and British Commonwealth decisions on perpetuities that we have been able to find, and that appeared to us to be relevant." Though it would be impracticable to cite all American authorities in a treatise of this size, leading American cases and important American statutes are also cited and discussed.

While the book contains a complete statement of the English law of perpetuities as it now exists, its primary emphasis is on the improvement of the rule. In almost every chapter is found "critical comment, segregated and designated as such, to assist the profession in developing a law of perpetuities adapted to modern needs and free from the defects of existing doctrine."[1]

The unique task of collaboration by these two eminent experts, one English and one American, was accomplished as follows.[2] About half the book was

[1] Preface, p. v.

[2] See statement in the Preface.

based on Part 24 of the American Law of Property, written by Professor Leach and his co-author.[3] This was "altered and rearranged as necessary to suit the requirements of the English reader." The remaining half is either new material by Dr. Morris or is based on law review articles by both authors. These materials have been successfully fused by Dr. Morris to create the unified treatise which has been published.

The first nine chapters, containing 247 pages, are devoted to the rule against perpetuities as a rule against remoteness of vesting. The three final chapters deal with the rule in *Whitby* v. *Mitchell*, the rule against accumulations, and trusts for noncharitable purposes. There are two appendices containing respectively statutes on perpetuities and statutes on accumulations.

An interesting feature of the book is a full discussion of the rationale of the rule. After discarding most of the reasons for the rule, including some which this reviewer has advanced, the writers agree with the reviewer that a realistic explanation of the rule is to view it as a "compromise between two competing policies—freedom of disposition by one generation and freedom of disposition by succeeding generations."[4] But then they go on to show that, under existing English legislation, "if the Rule were abolished today, it does not necessarily follow that the dead hand would tyrannize over the living to any inconvenient extent." One might expect, as a matter of logic, that on the next page the authors would then conclude that the Rule should be abolished. But, of course, anyone who knows them would realize that they would do nothing of the sort. Instead they state as their final conclusion, "on the whole the Rule does more good than harm. . . ."[5]

Legislative reforms of the Rule are discussed at some length.[6] As might be expected, they find great merit in the Massachusetts statute, which Professor Leach had such a large part in drafting, and even approve of the recent Pennsylvania statute, apparently, however, with reservations.[7] They continue with a statement to the effect that "A much more far reaching statutory change would seem to be justifiable, at any rate as an experiment. This would consist in giving the courts power to mould the limitations so as to bring them within permissible limits."[8] With this *cy pres* approach to the problem I am in hearty agreement, although it might be better, at least in the United States, not to have a blanket *cy pres* provision, but to provide a separate statute to deal with each particular situation which commonly arises.

It is surprising to note that, while both authors agree with the *cy pres* ap-

[3] Leach and Tudor, The Common Law Rule against Perpetuities, VI American Law of Property, Part XXIV (1952).

[4] P. 17.

[5] P. 18.

[6] P. 18.

[6] Pp. 32–35, 86–89.

[7] As to the reviewer's opinion of this legislation, see Simes, "Is the Rule against Perpetuities Doomed? The 'Wait and See' Doctrine," 52 Mich. L. Rev. (1953) 179.

[8] P. 34.

proach, one of them, Dr. Morris, does not approve of the "infectious invalidity" doctrine, so widely recognized by American courts. Just why a court would find any more difficulty in applying the doctrine of "infectious invalidity" than in applying the *cy pres* doctrine, I am unable to understand. Yet the only objection which the authors offer to legislation providing for a power to remould limitations *cy pres* is "it is likely to prove unpopular with the judges who would be called upon to exercise it."[9]

By way of conclusion, it should be said that this book is a unique achievement and is superbly done. It is a complete treatise on the English law of perpetuities, a comparative study of the English and American law on this subject, and a guide to statutory reform. It should be in the hands of every English lawyer whose practice involves the rule against perpetuities, and every legislator and law teacher, whether English or American, who is interested in criticising the rule or in reforming it.

LEWIS M. SIMES*

[9] P. 35.

*Professor of Law, University of Michigan.

BRUCK, E. *Über Römisches Recht im Rahmen der Kulturgeschichte.* Berlin: Springer Verlag, 1954. Pp. viii, 168.

This is a compilation, in German, of several papers and articles by a distinguished Romanist connected with Harvard University. The contributions in the volume had originally been published in English in various professional journals and collections of essays.

While Professor Bruck's articles deal with some special and diversified problems of Roman Law, they may be said to form a unity by virtue of the author's general approach to the questions discussed. All of the essays are characterized by the endeavor to analyze legal problems in the broad context of cultural and social history and to bring to light the human aspects intrinsic in the operation of legal ideas and institutions. In the reviewer's opinion, this is a fruitful approach which offers great promise for a future rewriting of Roman law history at large.

The first essay (which appeared in English in *Seminar*, Vol. VII (1949) pp. 1-25) offers a particularly suggestive example of the method employed by Professor Bruck and should be of special interest to the student of political ideology and propaganda techniques. It shows how a legally secondary public right, the *ius imaginum*, considered by most legal historians as a somewhat absurd detail of the unwritten Roman constitution, played a highly important role in cementing the loyalty of the people of Rome toward the nobility, who in fact (though not in law) controlled the destinies of the Roman Republic. The *ius imaginum* was the privilege of the descendants of the great families to show in their funeral processions the wax effigies and masks of their deceased ancestors who had held high office in the state. Bruck shows the tremendous propagandistic effect this custom had on the masses of Rome watching the

processions and how it strengthened the inclination of the people to elect to office the descendants of the great *nobiles* whose memory was immortalized by this practice. The second part of the article discusses the interesting phenomenon of *consecratio imperatorum*, the elevation of dead emperors to the rank of gods during the period of the Principate.

The next contribution (first published in *Seminar*, Vol. II (1945), pp. 1–20 under the title "Cicero vs. the Scaevolas, re: Law of Inheritance and Decay of Roman Religion") points out the relationships between certain facets of the Roman law of inheritance and the religion of the Romans in the late Republic. The author defends certain jurists of this epoch against Cicero's accusation that some practices recommended by them with respect to *sacra* (cult of the dead) to be performed by the heirs or legatees of a deceased person amounted to a profanation of sacral law. The third essay (first published in a slightly different form under the title "Foundations for the Deceased in Roman Law, Religion, and Political Thought" in *Scritti in onore di Contardo Ferrini* IV, pp. 1–42) discusses the legal nature of Roman foundations established for the purpose of commemorating and honoring the donor after his death and demonstrates some interesting connections between the growth of these foundations and the general decline of Roman religion.

A second group of articles (available in English in *Traditio*, Vol. III (1944), pp. 97–121 and *Seminar*, Vol. IV (1946), pp. 45–47) center around the problem of the "merry donor" and throw light on some intriguing interrelations between the areas of law and ethics. The key problem discussed is the significance of the subjective element of "liberality" in the law of gifts. As the author shows, the requirement of the Justinian Code (D. 39. 5. 1 pr.) that a gift must be prompted by motives of unselfish giving, charity, or munificence stems from Greek ideas, perhaps supported by the ethics of Christianity. The Romans (like, incidentally, the English), in so far as they recognized the validity of gratuitous transactions at all, merely required an *animus donandi*, i.e. nonexpectation of consideration for the gift, while the anchorage of the gratuity in altruistic or egotistic sentiments was regarded by them as belonging to the realm of ethics rather than law.

A short essay on "Caesarius of Arles and the Lex Romana Visigothorum" (published in English in *Studi in on. Arangio-Ruiz I* (1952), pp. 201–217), illuminating the political background of the Visigothic codification, and a personal account of an impressive incident involving the great historian Theodor Mommsen (also reported in *Journal of Roman Studies*, 1950, Vol. XI) conclude this stimulating and vividly written work.

EDGAR BODENHEIMER*

* Professor of Law, University of Utah; Visiting Lecturer, Yale Law School, 1955–1956.

VON HENTIG, H. *Die Strafe*. Vol. I. *Frühformen und kulturgeschichtliche Zusammenhänge*. Berlin, Göttingen, Heidelberg: Springer Verlag, 1954, Pp. v, 429. This is the first volume of a work the second volume of which, dealing with

the modern forms of punishment (*Moderne Erscheinungsformen der Strafe*), has just appeared. Only in part is it a legal study, and although addressed to the student of law as well as of religion, sociology, and ethnology, the author admits that a legal reader will feel less familiar with the materials than such other students of human affairs. The work is the product of long years of study of the problem of punishment, which study, in 1932, resulted in the first version of the present publication (*Die Strafe, Ursprung, Zweck, Psychologie*). But the author explains that it is in no way merely a new edition of the earlier effort. Twenty years of research have produced a totally new thing.

The book is divided into two parts. The first deals with the sociological aspects of punishment, involving, in chapter one, an analysis of two basic concepts, the object of punishment (*Strafnehmer*) and the punishing agency (*Strafgeber*), thus defining the social framework in which the punishment takes place. This social framework varies. The fact that at various historical periods not only the living members of a society were punished, but the dead, animals, and inanimate objects, and that punishment took the form of collective responsibility and of punishment "in effigy," suggests that there have existed in the past broader concepts of social structure than those to which we have become accustomed.

The second chapter, dealing with the punishing agency, is somewhat mechanically counterpoised to the object of punishment. But this distinction, suggestive of the division of the social group into something like the governing and the governed, is not as great as the title would suggest. Forms and objects of punishment are directly related to the punishing agency, and all three reveal the character of the social group and its cohesive forces. A list of problems successively discussed in the second chapter will perhaps make this proposition clearer: automatic punishment, banishment, blood vengeance, house arrest, sacral defense of society (human sacrifice) all deal with specific forms of punishment as characteristic of the type of society in which they occur. Each of these forms depends upon the nature of the prohibited wrong, the nature of the social cohesion, the formulation of the object of protection by criminal law in a given social group, and the mechanism of punishment. The author traces these various forms of punishment, sometimes in a relic form, up to our times. Of extreme importance in the emergence of modern penal systems has been the sacral form of protection of society. The penalty of death is traced by the author back to human sacrifice to pacify the anger of gods aroused by the violation of the social code.

The second book, devoted to the mechanistic variants of punishment, deals chiefly with the death penalty and its various real and imaginary (the curse) forms. In two short chapters, corporal punishments (flogging and castration) and punishment entailing infamy are discussed.

The wealth of material in this volume is enormous. The purpose of the book is to trace the genealogy of various forms of punishment. The author believes that: "Modern punishment belongs to psychology and sociology. However, its

roots reach deeply into the earlier layers of development, which precede the well-established legal order and the contemporary concept of its purpose." But it seems doubtful whether all the material brought in by the author to trace the modern concept of punishment is equally valid, and the reason is that the author, in order to enlarge the scope of his enquiry, has dispensed with the juristic definition of punishment. Is it profitable to dispense with the requirement that punishment follows a prohibited wrong, whatever the structure of the society and its cultural formation? And if it is not, then some of the illustrations of the author's propositions do not contribute to the clarification of issues involved. For instance, extermination of boyar families by Ivan the Terrible in Russia, the murder of the imperial family by the bolsheviks, extermination of the royal family in Serbia, the murder of Mussolini and his mistress, the events of the night of the long knives in Germany, *et cetera*, are not illustrations of punishments. All these events certainly belong to the field of valid sociological inquiry, might concern a student of psychology, of ethnology or politics, but certainly are outside the field of legal study. All juristic thinking, which is not immediately concerned with a practical problem, aims, finally, at a reform of the law, and in this connection the necessity to distinguish what is a measure of the legal protection of social values, and what is only violence, is commanding. Familiar as we are with the modern totalitarian practices, including Soviet law and its repressive provisions enforced against individuals and social groups only because of their potential danger to the established political and social order, we fear that the author has dispensed with the only effective guide to lead him through the maze of modern totalitarian institutions. "Punishment" of the innocent in the Soviet Union or in Nazi Germany may be termed an act of class or racial war, but not of justice.

Another reservation which the reviewer is compelled to make is that the author in his review, *à vol d'oiseau*, of various forms of punishment in various times and societies, groups them together in a single category overlooking certain essential characteristics. For instance, given as illustrations of collective responsibility are the Chinese law, which provided that high treason be punished by the death of the offender and of all his male relatives, and Hammurabi's code which ruled that if someone murdered the daughter of another his own daughter would be put to death. The first is a true case of collective responsibility, the other is an example of *ius talionis*, which frequently recurs in the legislation of Hammurabi. Both these pieces of legislation are criminal laws. But another illustration of collective responsibility given by the author, Ivan the Terrible's extermination of entire families of Russian boyars, is neither collective responsibility nor even law.

With these reservations, Professor Hentig's book is a remarkable study. The scope of the author's vision and his feeling for intimate connections between social phenomena occurring at various cultural levels and highly differing social surroundings, make his book most rewarding and thought-provoking.

KAZIMIERZ GRZYBOWSKI*

*Assistant Editor, Law Library, Foreign Law Section, Library of Congress.

KRONSTEIN, H.—MILLER, I. T. JR., *Regulation of Trade. A Case and Text Book.* New York: Fallon Law Book Company, Inc., 1953. Pp. xi, 1186.

As the subtitle indicates, this work is not only a casebook in the sense that it gives a survey of the leading cases in the field of trade regulation. It contains, besides these cases, other material on antitrust law and unfair competition, to a substantial extent—excerpts from Congressional hearings, from monographs, and explanatory notes by the authors. Another characteristic of this book is the attempt to draw, in broad lines, a complete picture of antitrust law, the law of unfair trade practices, and trade regulation by public power.

To cover these subjects within the confines of a single volume, the authors have drafted a system of trade regulations which is, in their opinion, common to both private and public restraints of trade. Therefore, it can be regarded as another purpose embodied in this book, to propose a system of the law of trade restraints and unfair competition that goes beyond the conservative method of assembling case groups according to similar circumstances of facts.

This system proposed by Messrs. Kronstein and Miller, which is necessary to the understanding of their work, consists of three main parts: Entry into and expulsion from trade, Exercise of trade, and Pricing. In the first part, public and private regulation of trade are distinguished. The second part, exercise of trade, deals with regulations affecting access to the factors of production (market, technology, credit, labor), with the relations between competitors (unfair trade practices), with trade symbols (trade mark, trade name, label, copyright), trade associations, and statutory limitations on corporations (interlocking directorates, etc.). The third part combines, for practical reasons, all trade regulations related to pricing (unfair methods of pricing, vertical and horizontal price control, pricing under government control).

These three main parts are framed by a prologue on the concepts and history of trade regulation in the United States, and a concluding chapter describing the procedural enforcement of the substantive law of trade restraints.

Certainly, this systematic approach has its merits. It helps the student to find his way through a jungle of cases and to make his own "outline" in this field of law. But every system has its prices and demands concessions. Thus, legal monopolies (patents, copyrights, trademarks) as the authors explain in their introduction, have to be taken up in several different parts of the book. For example, the doctrine of contributory infringement of patent rights in connection with the illegality of tying clauses under the Federal Trade Commission and Clayton Acts, is treated on p. 507 under the heading "Access to Technology," illustrated by the Morton Salt[1] and the Mercoid cases,[2] while Carbice Corp. v. American Patents Development Corp.,[3] a case which is necessary to the understanding of the doctrine, is found on p. 352 in the chapter on "Trade Symbols." Tying clauses, however, which are the common core of these cases, are discussed separately on p. 440 *et seq.* under the headline "Ac-

[1] Morton Salt Co. v. Suppiger, 314 U. U. 488 (1942).

[2] Mercoid Corp. v. Mid-Continent Investment Co., 320 U. S. 661 (1944).

[3] Carbice Corp. v. American Patents Development Corp., 283 U. S. 27 (1931).

cess to Market." Another tying clause case, F.T.C. v. Gratz,[4] is reprinted in the chapter on unfair competition on p. 622.

Another example showing that there might be different opinions about the best way of establishing a system of trade regulations is how horizontal agreements in restraint of trade are treated. Market divisions are discussed in the first part under the subtitle "Agreements in Restraint of Trade," horizontal price fixing in the third part in connection with vertical price control and other price manipulations like sales below costs. For the uninitiated reader, this does not make it easy to understand the important distinction between horizontal and vertical restraints of trade.

What these examples illustrate is the difficulty of finding a proper system of the law of trade restraints, that corresponds to the economic background of this field of law, and, at the same time, draws clear borderlines for this field, the law of unfair trade practices, and the law of the exclusive claims (legal monopolies). This problem deserves attention from the point of view of comparative law, since it seems to be unsolved in many countries.[5]

Naturally, the authors could not exhaust the broad themes of antitrust law, unfair trade practices, and government trade regulation in this book. They had to limit their selection of cases to the important and leading ones, and they solved this task with skill and experience. It may, however, be permitted to suggest that in a second edition additional stress should be laid upon the question of delivered price systems that are now solely represented by the U. S. Maltsters case,[6] and yet play an important role in American and international business practice. Another point that may deserve closer observation is that of divestiture and dissolution of monopolies, because here it becomes apparent whether the law is strong enough to make its intentions reality.

WOLFGANG FIKENTSCHER*

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[4] Federal Trade Commission v. Gratz, 253 U. S. 421 (1921).

[5] In the United States, the problems of how to reconcile the public policies of the antitrust laws with the law against unfair trade practices are centered around the Robinson-Patman-Act of 1936 and the state "Fair Trade" laws. For the possible conflicts between the antitrust laws and the public policy of the patent laws, see, *e.g.*, Oppenheim, Cases on Federal Anti-Trust Laws, Trade Regulation, St. Paul, Minn., 1948, p. 482 *et seq.* In Switzerland, these problems have recently been discussed by Rudolf von Graffenried, Grundlagen und gegenseitiges Verhältnis der Normen des gewerblichen Rechtsschutzes, Bern 1952. In Germany: *e.g.*, Goldbaum, "Fragen aus dem Grenzgebiet zwischen Urheberrecht und unlauterem Wettbewerb," Gewerblicher Rechtsschutz und Urheberrecht 1926, 297; Isay, Hermann, "§ 1 UWG und die Sondergesetze des gewerblichen Rechtsschutzes," Gewerblicher Rechtschutz und Urheberrecht 1928, 421; Ulmer, Eugen, Warenzeichen und unlauterer Wettbewerb in ihrer Fortbildung durch die Rechtssprechung, Berlin 1929; *idem*, Sinnzusammenhänge im modernen Wettbewerbsrecht, Berlin 1932; Hefermehl, "Der Anwendungsbereich des Wettbewerbsrechts," Festschrift für Nipperdey, Tübingen 1955, p. 283.

[6] United States Maltsters Association v. F. T. C., 152 F. 2d 161 (C. C. A. 7th, 1954).

* Research Assistant, University of Munich, Faculty of Law.

Book Notices

LANGROD, G. *La Science et l'Enseignement de l'Administration Publique aux Etats Unis.* Fondation Nationale des Sciences Politiques, Paris: Armand Colin, 1954. Pp. 185.

The author, professor at the University of the Sarre, member of the French National Research Center, and lecturer at *l'Institut des Hautes Etudes Internationales* of the University of Paris, has undertaken to introduce the European public to the American concept of public administration, both as a subject for instruction and as a research science. Public administration has developed in the United States along different lines than in Europe. In Europe it is a science dominated by legal thinking and has formed a part of the program of the university departments of law, while here it has been studied as an integral part of political science. Specialists on public administration in this country claim that the role of the lawyer in this field can be but marginal, that it can contribute little to the advancement of a study which is basically concerned with problems properly belonging to social inquiry. Some of the specialists claim that legal thinking, basically conservative in character, concerned with form and not with substance, is little suited to the needs of the science of public administration, which must remain dynamic, practical, and easily adaptable to the specific needs of life.

The first part of Professor Langrod's book gives a clear and comprehensive review of American literature on the subject of public administration, presents various doctrines and theories with critical analysis, and methods of research and inquiry. A separate chapter is devoted to organized research projects both government and private.

In the second part of his book the author deals with the different phases of instruction in public administration. After an introductory chapter covering in general terms the organization and spirit of various educational programs, the author describes in some detail the three steps of instruction designed to prepare a candidate for government service and, after he is employed, to improve his qualifications and professional standing: pre-entry education, in-service training, and post-entry training.

The importance of this monograph cannot be overemphasized. While it is specifically of value from the point of view of the European specialist, at the same time it is of general importance as a contribution in the field of systematization of ideas and problems. To point out one example, the United Nations program of technical assistance for underdeveloped countries, including instruction in the techniques of public administration, calls for a unified method of approach that will make it possible to translate the program into a common language at the specialist level. Professor Langrod's study demonstrates that this is not an impossible task in spite of differences in the academic pedigree of the science of public administraton in Europe and in this country. One of these differences lies in the fact that in Europe the science of public administration encompasses protection of individual rights, which in this country comes under constitutional law and is of lesser concern to public administration; at the same time, the scope of legal studies is wider than in this country and includes basic training in sociology and economics. Hence, although legal in stress, the European approach to the science of public administration is not exclusively legal; in the final analysis, differences between the American and European approach to public administration appear to be rather a matter of semantics and scope than of essence.

Detailed indexes (names, institu-

tions, and subject matter) permit easy orientation and make this a useful work of reference for all students of political and social science.

K. GRZYBOWSKI

SWENSON, R. J. *Federal Administrative Law. A Study of the Growth, Nature, and Control of Administrative Action.* New York: The Ronald Press Co., 1952. Pp. v, 376.

The author, professor at New York University, presents a particularly clear study of American federal administrative law as it results from judicial precedents, from doctrinal approach, and from legislative activity, chiefly the "Federal Administrative Procedure Act" of 1946. In the United States, the notion of "*Droit administratif*" has a particularly restricted meaning in comparison with the European conception; in fact, it includes only the means of judicial relief available to individuals against the administration, and proceedings both purely administrative and pertaining to judicial review of administrative matters. Beyond this, it lies in the sphere of extra-administrative control of administrative action, especially that exercised by the federal Congress. The legal structure of the administration, the general theory of the organization and operation of public services, the rules concerning administrative personnel, the concrete organization of powers on all levels, the typical forms of administrative action, scarcely appear; they are to be found scattered among "administrative science," "science of government," or certain branches of the law. Moreover, the chronological organization of the material is peculiar and seems strange to the non-American reader, since it reflects a specific line of reasoning, inspired by litigation. Thus "administrative law" in the United States in no wise corresponds to the same notion in Europe, whence come many misunderstandings of the content of these two homonyms with such totally distinct meanings.

In conformity with the subtitle of the work, the author depicts the growth of Federal administration in the United States "from laissez-faire to Bureaucracy," and places the latter in the tripartite scheme of constitutional powers. Starting from this upsurge of administrative activities to the present time, he examines the consequences of the "rule of law" both as respects the "administrative process" properly so-called, and the "enforcement of administrative action" by judicial action, finally considered as the "judicial processing of administrative action." Particularly arresting to the foreign reader is the chapter "Government by Agency or Government by Lawsuit" (Executive Justice vs. Judicial Justice), indicating the background of this burning issue of American practice and theory. The nature of federal administrative action thus becomes recognizable, and the whole problem of its control easier to comprehend.

Good manuals of American administrative law, such as this one or those of K. C. David, R. Pound, J. Hart, B. Schwartz, powerfully contribute to improved mutual understanding on a comparative basis. It seems that the time is approaching when a comparative study of Anglo-American and continental administrative law could be undertaken so as to promote better understanding of ideas and methods and to reconcile existing solutions.

GEORGES LANGROD

BOSCH, J. T. *El Procedimiento Administrativo en los Estados Unidos de América. La Federal Administrative Procedure Act de 1946.* Montevideo: Editorial Martin Bianchi Altuna, 1953. Pp. 265.

The author, a specialist in administrative law, with a record of 30 years practical experience in public service in Argentina, including the office of Solicitor of the Treasury (in many respects analogous to our Attorney General) gives Spanish readers in this book a clear, enlightening, and inter-

esting picture of our federal administrative procedure and its development. A preliminary chapter presents the background and history of the 1946 Act. The main body of the work provides a detailed examination of the statute and its application by the courts and the administration, with particular emphasis on the issue of judicial review. About 100 cases are cited and in many instances discussed. A feature, rare in Latin-American books, is a table of cases. The book ends with a summary of the debates *pro* and *con* in this country on the value and efficacy of the statute. The author refrains from expressing a personal opinion, but one might infer that he is a partisan of the Act. All is based on a conscientious study of our literature, books, and articles, of which a full bibliography is given (pp. 235–243). A final chapter, with a caution on the hazard in improper hands of the comparative method, recommends the study of our American law for use in the Argentine, rather than the past heavy reliance on continental writers on administrative law, inasmuch as the Argentine Constitution was largely modeled on that of the United States. An appendix contains a translation of the 1946 Act (pp. 221–233).

The author has recently completed a six months busy tour of the United States, on a State Department grant. One can look forward to further studies on our American system of government. One excellent article has already been published—on the institution of the Attorney General in the United States (La Ley, Buenos Aires, December 21 and 22, 1955).

PHANOR J. EDER

DEBEYRE, G. *Le Conseil d'État Belge.* Lille: Douriez-Bataille, 1953. Pp. 60.

LENOAN, H. *La Procédure Devant le Conseil d'État.* Paris: Librairie Dalloz, 1954. Pp. 323.

Le Conseil d'État Belge is the first commentary to appear on the law of December 23, 1946, which created the Belgian *Conseil d'État.* It traces the history of the political and legislative episodes that featured in its enactment, and sets forth, in some detail, an analysis of its competence. These comprise consultative powers, whereby the Council collaborates in the preparation of legislation, counsels the government in administrative matters, and suggests approaches for resolving demands for indemnification, in no case rendering judgments; and jurisdictional powers, whereby problems concerning the authority of provincial and communal bodies are decided by the Council. Along with the compact discussion of the nature of the role played by the *Conseil,* its composition is described (*conseillers, auditeurs, substituts,* and *assesseurs*), and the problem of selecting qualified officials considered.

La Procédure Devant le Conseil d'État is a considerably more comprehensive account of the functions and powers of the French *Conseil d'État,* and the procedures to be observed in invoking the exercise of its jurisdiction. As the body to which recourse must be had for the determination of causes within the purview of the *droit administratif,* practice before the *Conseil* has been based upon the principles of simplicity, inexpensiveness, and effectiveness. The territorial jurisdiction of the *Conseil* is nationwide, its jurisdiction has been exercised mainly through the use of two remedies: (1) *le recours pour excès de pouvoir,* and (2) *le recours pour détournement de pouvoir.* The first remedy is the rough equivalent of the Anglo-American concept of *ultra vires* acts, and the second is based upon abuse of administrative power. The work sets forth in thorough fashion the elements of French administrative theory, and documents quite completely the steps that each of a pair of adversaries must take in the course of prosecution of a claim. The meaning of a decision handed down by the *Conseil* is described, as is the recourse that may be had therefrom and the channels therefor. The text com-

prises a bibliography of general works, dissertations, and articles.

HILLIARD A. GARDINER

PARRA A. GONZALO L. *Die Regel "Locus Regit Actum" und die Formen der Testamente. La Regla "Locus Regit Actum" y la Forma de los Testamentos.* Munich: Druckerei Holzinger, 1955, Pp. (12) 299. (Bibliography, 6).

This doctoral thesis prints the German text on one page and the Spanish on the opposite page. After a critical examination of the supposed and true history of the doctrine of *locus regit actum* in Roman (ch. 1), canon (ch. 2), medieval, Italian, French (chs., 3, 4), and Dutch (ch. 5) law, the author examines the modern Anglo-American (ch. 6) and French law (ch. 7) and then enters upon his own analysis (ch. 8). English cases are discussed fully, but no American cases are cited, a summary of state statutes being given, which due to overcondensation, may be misleading. With this exception, there is a fairly complete presentation of the subject. There is a good chapter on whether the rule is imperative or optional (ch. 9) and a chapter (ch. 9) on fraud or evasion of the law in conflicts law (ch. 10), which has no visible connection with wills. The author goes too far in stating that this doctrine has no counterpart in the common law. The final chapter (ch. 11) deals with the application of the rule "*locus regit actum*".

PHANOR J. EDER

BOSCHAN, S. *Europäisches Familienrecht (Ausland).* 2nd ed. Berlin/Frankfurt/M: Verlag Franz Vahlen GmbH., 1954. Pp. 357.

German practitioners and courts frequently have to ascertain foreign laws relating to personal status because their national conflict of laws rules apply the national law of an individual in these matters. Boschan's book provides the practicing lawyer with a systematic digest of the European laws on persons and family, with the exception of those of Ireland, and adds for each topic the corresponding conflicts rule which is relevant to establish a possible renvoi. The digest is so detailed and well known that lower courts often use a reference to the book as proof of the foreign law. The book is also useful for an exposition of the pertinent rules and as a key to a closer study of the texts.

A caveat may be added: the author apparently had not had at his disposal the new Hungarian legislation of 1952 which differs considerably from the law as stated by him. This is the more regrettable as the complete digests of the other recent East European enactments are noteworthy.

ULRICH DROBNIG

BATIZA, R. *Tres Estudios sobre el Fideicomiso.* México: Imprenta Universitaria, 1954. Pp. 194. (bibliography 79–81, 127–129, 158–160).

To the already substantial comparative literature of the Anglo-American trust and its Mexican derivative, the *fideicomiso*, the author in this book adds another scholarly and practical contribution. He is well qualified by virtue of studies at Columbia and Fordham Law Schools, experience in a New York law office, and his work as head of the trust department of one of the Mexican banks.

The three essays deal with the Contractual Element in Fiduciary Relations, the Rule against Perpetuities, and Life Insurance Trusts.

A succinct, clear, and accurate history of the trust in Anglo-American law and in Mexico is given. The author is forthright in his view, based on Mexican experience, that the institution is adaptable to Latin America and the Continent of Europe. Two early works, not generally known, are quoted: Van Hall, in Dutch (1896), and Preston, in French (1904).

While fully recognizing that in our law a trust is not a contract, he maintains, refuting the opinions of others, that the *fideicomiso is* a bilateral contract.

The essay on Perpetuities is the first good exposition of our law in Spanish that I have met. It discusses only the common law rule, ignoring the statutory modifications in several states. This is pardonable since the author's purpose is to furnish a background for the Mexican law. Mexican law theoretically permits the possibility of analogues to our varied future interests, but they are rarely found in practice. It has in substance adopted, for trusts, the rule against perpetuities except the additional period of 21 years. Contrary to the view of some writers who misinterpret the statute and claim that the duration of a private trust is limited to 30 years, he concludes that a Mexican trust *inter vivos* based on the duration of a life in being is valid, notwithstanding it extends beyond 30 years.

Although there is nothing in Mexican law that stands in the way of life insurance trusts, they have not yet been used. The author recommends their adoption, but suggests an amendment to the law to expressly exclude the application of the rule against perpetuities.

Appendices contain the texts of the pertinent Mexican statutes and the rules of the National Banking Commission.

PHANOR J. EDER

KIELWEIN, G. *Die Straftaten gegen das Vermögen im englischen Recht.* Issue No. 15, of the Rechtsvergleichende Untersuchungen zur gesamten Strafrechtswissenschaft. Bonn: Ludwig Rörhscheid Verlag, 1955, pp. xvi, 226.

The title of the book suggests to the European lawyer a definite class of crimes, which in practically all European codes are identically conceived. Technical progress, of course, creates new problems which are differently solved in various countries, but as a category of juristic thinking crimes against property have their time-honored place in the theory of criminal law.

To the common-law lawyer this title will be suggestive of a somewhat different range of ideas and a different scope of inquiry. The main difference is that in Europe the title would suggest a purely substantive criminal law problem, autonomous in its definitions and firmly separated from private law and adjective criminal law. The author, however, quite rightly deals with the problem of crimes against property in its entirety as it poses itself in the mind of an Anglo-Saxon lawyer. He describes in historical perspective English practice, jurisprudence, and statutory law dealing with crimes against property, not only from the point of view of the substantive law, but also connected procedural and private law problems. Specifically, the book deals with larceny, robbery, extortion, embezzlement, fraudulent conversion, falsification of accounts, common law cheat, obtaining by false pretenses, fraud, and receiving stolen property.

Written with great competence and clarity, the study closes with the presentation of past codification efforts in this field of English criminal law and the future prospects.

K. GRZYBOWSKI

LANG-HINRICHSEN, D. *Das Strafsystem im ausländischen Strafrecht.* Rechtsvergleichende Untersuchungen zur gesamten Strafrechtswissenschaft. Bonn: Ludwig Röhrscheid Verlag, 1955. Pp. 97.

The work is based on the legislation of the following countries: United States, England, Austria, Italy, France, Belgium, Portugal, Spain, Argentine, Brazil, Peru, Cuba, Sweden, Norway, Denmark, Holland, Greece, Soviet Union, Poland, Czechoslovakia, and Yugoslavia. However, various matters that properly belong to a system of punishment, are excluded, thus substantially limiting the scope of the inquiry. In fact, Professor Lang-Hinrichsen's work is restricted to two basic issues, the purpose of punishment (retribution, general prevention,

special prevention, and measures of social protection) and the most important forms of punishment according to the codes in force. The book contains an interesting chapter on the punishment of legal entities.

Code laws exclusively are considered, all special legislation as well as the more important military penal codes. In Eastern Europe (Soviet Union, Poland, Bulgaria, Hungary, Rumania, and Czechoslovakia) the most important crimes and offenses against the state, social, political or economic order, even though committed by civilians, are tried by military courts and are punished according to the provisions of the military codes. In addition, although the criminal codes of most of the Soviet satellite countries have been brought up to date and the bulk of special legislation included in their provisions, in Poland and Hungary pre-communist codes have not been amended, and a great number of special laws dealing with penal matters are simultaneously in force. Military codes and special legislation, which in these countries take a central place in the penal system, differ basically from the pre-communist codes and represent a different type of legislation. The author's restricted task, however, could not consider these matters. Consequently the description of the situation in countries of Eastern Europe is far from complete, both as regards the purpose of punishment, and the forms of most important penalties.

Otherwise, this is a useful publication, which has its place on a reference shelf. K. GRZYBOWSKI

Das Spanische Strafgesetzbuch. Tr. by Dr. Antonio-Ripolles and Dr. Johanna Heilpern de Quintano in cooperation with Dr. Helmut Scharff. Berlin: Walter de Gruyter & Co. 1955. Pp. xiv, 109.

The translation of the Spanish Criminal Code is the 69th volume in the impressive collection of foreign criminal codes in German (*Sammlung ausserdeutscher Strafgesetzbücher in deutscher Übersetzung*). As in other European countries, the Spanish Criminal Code, which is a moderately conservative piece of legislation, represents only a fraction of the penal legislation in force. Other laws are repealed only when they have been incorporated into the Code, or are in conflict with its express provisions. However, the law on state security is expressly upheld and continues in force.

The text of the Code is preceded by a short introduction giving in a concise form a most useful analysis of the Code, its relationship to the earlier Spanish penal legislation, the extent of the reform of the Spanish criminal law, and finally the place of the Code in European penal legislation. It ends with a short bibliography of the most important works relative to the Code.

The editors of the Collection announce that translations of the Polish, Bulgarian, Netherlands, and Cuban criminal codes are in preparation.

K. GRZYBOWSKI

KARAMUNTZOS, A. *Die vorläufige Festnahme bei Flagrantdelikten.* Rechtsvergleichende Untersuchungen zur gesamten Strafrechtswissenschaft. Bonn: Ludwig Röhrscheid Verlag, 1954. Pp. xvi, 86.

After an historical introduction describing the evolution of temporary detention *flagrante delicto*, the author deals briefly with the relevant provisions of the criminal procedures of fifteen countries. However, the analysis which follows in part two of the book is less ambitious in scope and is restricted to the law of Western Europe, with special emphasis on the law of Greece, leaving out all countries having the Soviet type of law. This is a sensible plan since no profitable analysis of the penal procedures in these countries can be undertaken within such narrow scope of inquiry, as there is no judicial check on the arbitrary powers

of the police, which after all is a precondition of any legality of penal proceedings in this connection.

In an appendix the author gives useful translations of the relevant provisions from the codes of criminal procedures of the countries treated.

K. GRZYBOWSKI

BAUER, F. *Freiwillige Gerichtsbarkeit.* 1. Buch. *Allgemeines Verfahrensrecht.* Tübingen: J.C.B. Mohr (Paul Siebeck), 1955. Pp. xvi, 413.

The author, formerly judge on an Oberlandesgericht, has written the first modern comprehensive treatise on noncontentious jurisdiction in German law. This jurisdiction, which has a certain resemblance to equity jurisdiction, formerly functioned in the areas of commercial and marriage contracts, land registration, supervision of guardians, the related protection of infants, and in matters of succession. But the last decades have added many new fields: declaration of death of absentees, division of household goods after divorce, adjustment of contracts affected by certain general types of *force majeure*,—war, expulsion, or currency reform,—and the restitution of confiscated property.

For all these matters, the judge is authorized to find, after careful investigation, a just and equitable solution, which constitutes a departure from the traditional rules of civil procedure. The author develops the general rules of noncontentious jurisdiction, always closely comparing it with the traditional system of civil procedure. In spite of the theoretical differences, the two branches of jurisdiction tend to approach each other; civil procedure, by activating the investigative role of the judge, noncontentious jurisdiction, by introducing safeguards against possible abuse of the wide discretionary powers of the court.

This volume contains only the general rules under the headings: Functions and Sources; the Courts; the Parties; Procedure; Decisions and Appeal; Fees; another volume will treat special procedures. It can already be said that the work will become a primary treatise for reasearch, teaching, and study in its field.

ULRICH DROBNIG

STREBEL, H. *Die Verschollenheit als Rechtsproblem.* Frankfurt/Main: Alfred Metzner Verlag, 1954. Pp. vi, 147.

Absence with the presumption of death has been the sordid fate of millions after wars and persecutions. It is no wonder that this phenomenon in the recent past has presented an urgent practical issue; indeed it is still such. Attempts to reach a world-wide solution, which resulted in the United Nations Convention on the Declaration of Death of Missing Persons of April 6, 1950, and its failure (the Convention has thus far been ratified by four countries only) have revealed the widely different approaches to the problem in the various legal systems.

To bridge this gulf of ignorance or misconception is the purpose of the present comparative study. It is not a comparative treatise of the usual type; there is, with the exception of German law, no well-rounded presentation of the various national rules on absence, and no concluding chapter with "comparative remarks." The author, a German authority on the subject, presupposes (and indeed possesses) an extensive knowledge of the divergent legal systems. He begins with a thorough analysis of the main types of national solutions, focusing attention on two systems: (1) one, the Romanic, in which absence as such is legally relevant, with various consequences as to the absentee's heirs, insurance policy, marriage, etc., which, however, are not necessarily identical with the effects of death. (2) In the second, or Germanic, system, a rebuttable presumption of the absentee's death, if established, has all the normal legal consequences that death entails. The

procedure, however, differs; in German law, death is proved in a special judicial proceeding; in Anglo-American law, a prima-facie rule is applicable to determine the question incidentally in any given proceeding. The exposition of the numerous questions to be solved in proceedings referring to absence is accordingly systematized.

In spite of the sometimes abstract and complicated language, those specially interested in the subject will be richly rewarded by reading the book.

ULRICH DROBNIG

PLANITZ, H. *Die deutsche Stadt im Mittelalter. Von der Römerzeit bis zu den Zunftkämpfen.* Graz/Köln: Böhlau Verlag, 1954. Pp. xvi, 520.

The usual methods of research in the history of the German cities have been predicated upon analysis devoted solely to the theory of the evolution of municipalities, markets, or organized county or urban communities. The method of research employed by the author of the present treatise, professor in the University of Vienna, is new, constituting a radical departure from those hitherto followed, and is admirably adapted to comparative research. As stated in the foreword, the growth of a highly complicated and diversified body of law, the medieval municipal law, necessitates comprehensive observation of historical, legal, and social phenomena; to restrict analysis by one-sided and more or less arbitrarily chosen theories would produce inaccurate results. Suffice it to point out the names of a few cities, picked out at random from the impressive wealth of the material treated: Köln, Trier, Strasbourg, Maastricht, Bonn, Bremen, Ulm, Frankfurt, to justify this theory; the story of these towns is at the same time the history of the Holy Roman Empire.

Throughout the book, which incidentally, represents the preparation and research of more than two decades, the reader's main impression is the changing interaction of facts and legal norms; the actual happenings of life as, for instance, the building of a square that becomes the city market, the successive extension of the Hansa trade routes, or the union of merchants and tradesmen into organized communities, conditioned the creation of laws, charters, and treaties; these in turn, through the process of gradual systematization and abstraction reached the point at which the "existence of the law of a city (*Stadtrecht*) became the proof of the existence of the city itself."

The first and historical part of the work commences with the Roman municipium and reaches to the end of the thirteenth century. The early history of the German cities begins after the fall of the Roman Empire; thereafter the Roman city disappeared as an independent legal entity and, at the same time, the center of culture shifted from the Mediterranean area towards the North, to the territory between the Rhine and the Seine that became the Carolingian Empire of Charlemagne. Mercantile development was followed by urban development; charters of kings and bishops granted freedom of commerce, freedom from taxation, and various immunities and privileges, until by the end of the twelfth century, "town air made free" (*Stadtluft macht frei*). These freedoms, together with the privileges by which they were granted, were gradually incorporated, first, into the *ius forense*, later into the *ius mercatorium*, and finally, into the common law of the German citizenry, the *ius civile*. The nomenclature *cives* appears as early as 1069 in Toul, 1074 in Köln, and soon after in Bremen, Speyer, and Cambrai, and *civitas* designated the city as a legal entity at about the same period.

The second part of the book is devoted to the German city from the thirteenth century, and ends with the beginnings of the fights between the guilds. Although the initial chapters treat the founding of cities, supplemented by exact topographical data,

drawings, charts, and maps, the emphasis is on law proper. The city as a legal person, the construction and functions of the city council, and finally, the supremacy of the guilds and the notion of the city community are exhaustively analysed in the framework of the development of municipal self-administration and autonomy. The evidence of the high standard of German municipal culture was the fact that certain city laws were taken as models for later urban formations; thus, for instance, the law of Köln was the model for Freiburg, Lübeck, and Hamburg, the law of Magdeburg for Kulm, Stettin, Posen, and Krakow; the colonisation in Eastern Germany adopted the laws of Breslau and Leignitz, while some other cities in the Eastern zone followed the Frankish and Flemish laws. VERA BOLGÁR

VON HIPPEL, F. *Die Perversion von Rechtsordnungen.* Tübingen: J.C.B. Mohr (Paul Siebeck), 1955. Pp. xvi, 213.

This is a study of the problem expressed in Goethe's phrase, *Recht wird Unrecht*, i.e., the modern phenomenon of the legalistic-constitutional cover for the *état criminel*. The author bases his extensive investigation on the literature of many nations, as well as the more specialized publications concerning war-crimes. More specifically, the work seeks to explain the penetration of the worst gangsterism known to history into the highly civilized and legalistic system of the Weimar Republic through the shrewd employment of legality and constitutionality by Adolf Hitler, appropriately nicknamed *Adolfe légalité*, in his ascent to power.

Starting with the mock trial against the alleged originators of the notorious Reichstagfire, the author reviews the official perversion of law and legal procedure in the nazi regime, characterized by progressive deterioration of legal-ethical values, sinking to crimes of incredible depravity and scarcely concerned to veil them by the mask of legality when so-called enemies of the state (*Staatsfeinde*) were concerned. In this account, the various federal German laws decreed by Hitler shortly after his ascent as chancellor of the Reich, partially with the aid of Hindenburg and the *Diktaturparagraph* 48 of the Weimar constitution, and partly as authorized by the *Ermächtigungsgesetz* of the last Reichstag, are duly examined.

However, the one element of critical importance is not considered: the centralization of the *switchboard-state*, as Germany under the Leader may be called. In a sense, the Weimar Republic was more centralized than Germany under Wilhelm II: The Reichspresidency was comparable to the American presidency, but essential powers were vested in the chancellor, and the Länder enjoyed much less autonomy than the American states. Since the Länder were ruled by cabinets of state ministers, not headed by a governor or a *Staatspräsident*, as Bavaria from time to time suggested, the German people with their innate urge to establish a half-mystical connection between the individual and the whole looked upon the *Reichspräsident* also as the head of their smaller state unit, their *Heimat*. Paradoxically therefore, the Hitler system continued the centralizing tendency of the Weimar constitution.

The innermost motivation for the perversion of legality, characteristic of totalitarian government, the author finds, is an apparently honest, fanatical, and therefore unchangeable conviction of the ruling party's righteousness. Neither Lenin, nor Trotzky, nor Hitler, nor their intimates ever believed that they were fallible; those who did not share their conviction were immediately accused not only of error, but also of adopting a criminal and base attitude.

A very complete alphabetical index of references to persons and subject matter concludes the volume.

ROBERT RIE

STUDENIKIN, S. S.—WLASSOW, W.A.—JEWTICHIJEW, I. I. *Sowjetisches Verwaltungsrecht. Allgemeiner Teil.* (German translation). Berlin: VEB Deutscher Zentralverlag, 1954. Pp. 295.

The increasing impact of Soviet law on Eastern Europe is attested by the growing number of translations of the semi-official Russian treatises. This volume on the General Part of Soviet Administrative Law was originally edited by the Union Ministry of Justice in 1950. As four years have elapsed since, the semi-official German editor of the volume has felt it indicated to add a caveat reminding the reader of the supervening politico-ideological changes in Russia and also cautioning against blind imitation of the Russian model.

The general treatment of the subject closely follows the continental pattern. The book is divided into eight chapters beginning with the subject, the sources, and the system; followed by history and the basic principles. Further topics include administrative agencies; civil service; administrative acts; enforcement; and control. These subject matters are treated in a rather unattractive manner, and in an exact, but dry language without any attempt at illustration by examples (not to mention cases). But whoever is interested in the theory of Soviet administrative law will be grateful that an authoritative treatise is now accessible in a Western language.

ULRICH DROBNIG

VANDERBILT, A. T. ed. *Studying Law: Selections from the Writings of Albert J. Beveridge, John Maxcy Zane, Munroe Smith, Roscoe Pound, Arthur L. Goodhart, Eugene Wambaugh, John H. Wigmore, Charles B. Stephens.* 2nd ed. New York: New York University Press, 1955. Pp. viii, 753.

The only new material in this admirable and well-known book is Chief Justice Vanderbilt's new Introduction; and in this, besides attractive characterisations of some of the authors, especially Munroe Smith, the most interesting feature is his defence, against critical reviewers of the first edition, of his decision to reprint the late Senator Beveridge's essay "The Young Lawyer and his Beginnings." He is surely right: it is the highest realism to do what one can to counteract the tendency to cynicism that every lawyer must inevitably contract in the exercise of his profession. But an English lawyer may wonder whether the stage is not set differently in America and in England for the discussion whether a lawyer should assist a client whose case he does not believe to be just; for Lord Brougham was probably thinking mainly of the barrister, who receives his instructions from a solicitor and seldom comes into direct contact with the lay client before he sees him in court. It is easier for him to preserve the detachment necessary if one is to serve all and sundry without lending oneself to a perversion of justice.

F. H. LAWSON

CORWIN, E. S. *The Constitution and What It Means Today.* 11th ed. Princeton: Princeton University Press, 1954. Pp. xiv, 340.

This new edition of a famous book has been considerably expanded through extensive use of the Government Printing Office's publication, *The Constitution of the United States of America, Annotated; Analysis and Interpretation*, of which the author was editor, and so is almost to be considered a new book. It would be impertinent for an English reviewer to do more than appraise it from the point of view of an English lawyer or student of politics, but as to that I should say that, though it does not need for its use an expert knowledge of American government, it is not for the mere beginner, who, in England at any rate, should still, I think, start with the short course of six lectures which Sir

Maurice Amos delivered in 1932, and supplement his preliminary reading with Professor Brogan's books. However, once past that stage, this is the book which, by its racy non-technical handling of the subject, can best give the non-expert a rapid view of what has happened to the various provisions of the written Constitution. It is indeed still, what it has always been, an extraordinarily vivid account, of a pregnant terseness that would have done credit to Aristotle. F. H. LAWSON

PALMER, N. D.—PERKINS, H. C. *International Relations. The World Community in Transition.* Boston: Houghton Mifflin Co., 1953. Pp. xi, 1270.

This book has several virtues. In the first place, it is remarkable for its comprehensiveness. It embraces all major areas of international relations. Three parts are devoted to the general principles of international relations, three to the course of international politics since 1900, one to the United Nations, and one to the future of the world community. The amount of material worked into this book is enormous. The volume therefore is useful not only as a textbook but also as a book of reference. One may regret, however, that the references to literature cover only materials written in English.

A second merit of this book is its objectivity and caution against one-sidedness. The authors state in their preface that they endeavored to be objective, and their aim is admirably achieved. They clearly present issues and facts without advocating specific opinions. Numerous quotations from many of the best authorities, often contradictory, are inserted in the text which enables and stimulates the reader to form his own judgment. The final part of the book is characteristic of the whole volume. There the authors show that there is neither any single cause of the world's ills nor any single solution or panacea for betterment. "The job ahead is not to deny conflicts of interest, still less to suppress them; it is to achieve the maximum of adjustment and to tolerate the residue." (Pp. 1206).

A third advantage of this book is that, even though it is very voluminous, it is easy and interesting to read and is well illustrated with maps and charts.

As in most books on international relations, one feels the difficulty which the authors must have had in organizing their huge and heterogeneous subject. Some overlapping of chapters seems to be inevitable, e.g. European integration is dealt with both in the chapters on the Rebuilding of Europe and on the New Regionalism. On the whole, however, it is astonishing how well the authors have succeeded in presenting the subject matter in a clear and simple manner.

DIETRICH SCHINDLER

Business Concentration and Price Policy. A Conference of the Universities-National Bureau Committee for Economic Research. Princeton: Princeton University Press, 1955. Pp. x, 514.

Economists are certainly not bound to look to antitrust issues when they discuss their theories of business concentration and price policy. But equally certainly, antitrust lawyers must look to the theories of the economists if they are to justify their use of economic concepts like monopoly and competition in everyday practice. This antinomy exactly defines the main difficulty in the field of trade regulation, and especially antitrust legislation, namely, that law works with economic concepts, but that the ends of the law go beyond what economic research includes. Thus the lawyer and the judge, in applying economic terms, frequently are unable to settle a case with economic theories, but must rely upon precedents and the common sense.

An antitrust lawyer who has realized this situation, will appreciate this book.

Here a distinguished panel of renowned economists dig into the main problems of antitrust law that cluster around business concentration and price policy. They discuss these questions from modern standpoints and on the basis of recent census evaluations. Their result is not encouraging to the lawyer, for they state, all in all, that it is very difficult, if not impossible, to give clear and decisive tests for the degree of business concentration, or firm standards for "good" and "bad" price policies. To the lawyer, this inability to establish reliable yardsticks for the most ambiguous problems of trade regulation, is somewhat disquieting. Involuntarily, one is tempted to ask how antitrust cases might be decided at all with adequate economic results since the Sherman Act was passed in 1890. Again, legal policy and common sense must be cited as the essential foundations of antitrust control.

In two respects, however, connections should be sought between the law of trade restraints and economic theory: In the formation of exact *concepts*, like market, monopoly, competition, and in the erection of a workable *system* underlying the antitrust law. Both questions have been raised from the legal point of view in the book of Messrs. Kronstein and Miller reviewed above. Now this economic work shows, from another side, how important a co-operation of law and economics would be, and how carefully the lawyer, judge, and law teacher must use economic terms and theories when concerned with trade restraints. In these respects, this book is equally valuable for economists and jurists.

WOLFGANG FIKENTSCHER

SMITH, D. T. *Effects of Taxation on Corporate Financial Policy*. Boston: Harvard Business School, Division of Research, 1952. Pp. xii, 301.

This book is the fifth in a series resulting from research on the effects of taxation on business. Its purpose is not only to explain the effects of federal taxation, by itself, on corporate financial policy but also to indicate the significance of such taxation relative to the other factors which theoretically or actually influence the decisions of corporate executives on financial policy.

The book is divided into two parts. The first deals with widely owned corporations. Here Professor Smith explains the tax and other factors which bear on the choice between debt and preferred stock financing, the non-tax costs of new common stock financing, the effects of the corporation income tax on such costs, the desirability of financing through retention of earnings, and the attitudes of business men toward financing widely-owned corporations, as disclosed in meetings and personal interviews, illustrated by reference to specific examples.

The second part of the book deals with closely controlled corporations. In it, Professor Smith discusses factors which affect the relative attractiveness of a corporation and a partnership; the capital structure of new corporations, including the desirability of relatively large issues of senior securities; the tax factors for and against retention of earnings; the disadvantages of outside financing, both to existing stockholders and to investors; and the problems involved in sales or withdrawals of part interests.

Professor Smith's book is particularly enlightening for the reader who knows the rudiments of federal income taxation but is ignorant of the other factors which influence decisions in the field of corporate finance. Failure to consider tax factors can be ruinous, but a failure to take the other factors into account can be just as impractical. Thus this book should be useful to the tax lawyer.

Professor Smith generally does not deal with the details of federal tax law or its interpretations, except in the chapter on sales or withdrawals of part interests, where he discusses the tax

consequences of stock dividends, recapitalizations, and partial liquidations. In that chapter, he makes some recommendations as to changes in the law. Since the publication of this book some changes have been made, through the enactment of the Internal Revenue Code of 1954. That does not render Professor Smith's book obsolete, however, since it is interesting to note Professor Smith's suggestions and criticisms in the light of the changes which have actually been made.

LESTER R. RUSOFF

SWINDLER, W. F. *Problems of Law in Journalism.* New York: The MacMillan Company, 1955. Pp. xxii, 551.

While intended for the use of journalists rather than lawyers or law students, there is much in this book to commend it to both groups, as well as to all others concerned with information, authoritatively presented, on the subjects covered. A modified case method is used; in placing each problem of journalism against the background of law bearing upon it, a reasonably complete picture is presented.

There are three parts: (I) The Newspaper: News Side, (II) The Newspaper: Business Side, and (III) Related Fields of Journalism. Part One deals with press freedom, its history and its practical definition; the question of freedom to gather news and the position of the newspaper in this regard; libel and the defenses that may be interposed to such suits; the law of privacy and the law of contempt; and copyright and property in the news. Celebrated decisions like *Near v Minnesota, Schenck v U. S., Abrams v U. S., Dennis v U. S.,* and *Hannegan v Esquire* are copiously quoted. Part Two treats administrative issues and their application to journalistic business practices, labor relations, advertising, and taxation. The case of *Associated Press v U. S.,* among many others, is here considered. In Part Three, radio journalism and its development from an historical and legal point of view is interestingly analyzed.

Over two hundred cases are quoted from in the text, all to the point where the legal issue is clearly demonstrated. A table of cases assures the user of referential value. Each chapter contains, in addition, a list of sources for supplementary reading.

HILLIARD A. GARDINER

TAYLOR, T. *The Grand Inquest: The Story of Congressional Investigations.* New York: Simon and Schuster, 1955. Pp. xviii, 358.

This is an excellent study in ten chapters and three appendices, of the origins of Congressional investigatory practices, the historical events from which they sprang, the constitutional provisions that have borne and have not borne upon their exercise, and the abuses and inequities that have evolved in the course of development of a process that was designed only to inform.

In the course of describing the landmarks in this development, constitutional principle is amply considered: the doctrine of the separation of powers, the privilege against self-accusation, the delegation and reservation of powers, and the Bill of Rights and other guarantees of individual liberty. The author recommends Congressional abstention, (a) through repeal of the permanent subpoena power provision of the Legislative Reorganization Act, which would make Senate authorization a prerequisite to any investigation, and (b) by having the Congress employ court orders to compel the testimony of recalcitrant witnesses, thereby obviating the gamble on the part of a witness who refuses to testify, with a jail sentence as his price for being wrong.

Of especial comparative interest is the author's discussion of Parliamentary and colonial practice, as well as that concerning continental expe-

rience. Parliamentary power to compel testimony knows no limits in legal theory because of the exclusively informational purposes of British committee inquiries. French and German investigative practice is embryonic, because of an attitude that individuals should be investigated by the police and tried by courts, instead of by politicians. The privilege against self-accusation, from Magna Carta (1215), is considered, and makes fascinating reading. There is in the appendix a note on British Parliamentary Investigative Practice, one on the Compulsory Testimony Act (which has been declared constitutional since the book, was written), and one on outlawry—the ancient judicial sanction that deemed an individual outside the protection of the law.

HILLIARD A. GARDINER

RADIN, M. *Radin Law Dictionary*. New York: Oceana Publications, 1955. Pp. 408.

The late Professor Radin left at his death in 1950 the manuscript of this book, which has since undergone hardly any alteration. Admirers of the author may regret that he had not an opportunity of correcting a fairly large number of mistakes, some of which at least he would assuredly not have allowed to stand. Thus, as a Roman lawyer, he could not have said that a noxal action was an action for damage or injury by animals brought against the owner. Indeed, I suspect that he had not looked at his manuscript for some time before his death. Thus, not only are some of his references to England loose, as in the entries *Police* and *Privy Council*, but they are sometimes out of date, as where no mention is made of the abolition of the doctrine of common employment (fellow servant rule) in 1948. The conclusion seems to be that the book should be used less for reference than for browsing; and for that its liveliness makes it well fitted.

F. H. LAWSON

ERLER, G.—KRUSE, H. *Deutsches Atomenergierecht*. Göttingen: Verlag Otto Schwarz & Co., 1955. (loose-leaf edition)

This is the first supplement of an edition that the authors intended to expand simultaneously with the developments in the field of legal regulations on the production and peaceful uses of atomic energy in Germany. The present supplement contains, under the headings specified below, the various rules in effect from May 5, 1955, the date when the restrictions imposed by the occupation on German science and industry with respect to domestic research and exploitation of atomic energy were withdrawn. As the supplements are intended to be of guidance to both technicians and lawyers, the various chapters show a variety of technical and legal information, the former summarized in the Introduction that contains data on the basic technical notions of nuclear energy, nuclear reaction, isotopes, etc. The subsequent chapters are on International Agreements, Labor Regulations, Commercial and Mining Regulations, Industrial Property, and the case law in the German courts. The available legal material is, naturally, scarce, and no cases are reported. The last two sections are merely set up for later additions in bibliography and commentaries, as well as in a subject index.

VERA BOLGÁR

LETOURNEUR, M.—MÉRIC, J. *Conseil d'État et jurisdictions administratives*. Paris: Collection Armand Collin (Section de Droit) No. 296, 1955. Pp. 204.

The Foreword to the present volume is written by Mr. René Cassin, Vice-President of the Conseil d'État and Member of the Institut Français. He states that the authors have succeeded through the lively presentation of the topic to familiarize the general public with the complex competencies of the *Conseil*, as well as its jurisdiction and activities.

The authors, officials of the French

Conseil d'État, state in the introduction that their aim is to describe in a popular way the essential ideas governing its functions rather than to write a scientific treatise. Frequent reference is made to the articles in the important work celebrating the Hundred and Fiftieth anniversary of the *Conseil d'État*, created by Napoléon I on December 25, 1799,[1] but they correctly recall that the origins of the *Conseil* are much older. The *Conseil du Roi* of the 13th century was the direct, although remote, ancestor of the present *Conseil*, and important landmarks for its development were established in the first half of the 16th century and especially during the reign of Louis XIV.

The historical data concerning the *Ancien Régime* and the modern *Conseil d'État* of the 19th and 20th centuries, are followed by a description of its composition, the hierarchy of its members, their appointment and promotion. The functions of the *Conseil* are treated in the following chapter. Reference is made here, first, to its consultative activities in examining the draft bills of Parliament prepared by the Executive, as well as the drafts of executive orders and other rules and regulations through the authoritative interpretation of the legal texts in force, and, second, to its advisory activities on other kinds of legal problems. The second part of the same chapter treats the administrative jurisdiction of the *Conseil d'État* in its *Section du Contentieux*, and also the rôle of the *Tribunal des Conflits* in resolving jurisdictional controversies between the civil and administrative tribunals. In addition to describing the different types of cases brought to the *Section du Contentieux*, the authors select examples from the case-law of the *Conseil d'État*, and from the "conclusions" of the *Commissaire du Gouvernement* attached to the *Conseil*.

Chapter IV treats the organization and procedure in the different sections of the *Conseil d'État*; Chapter V the administrative tribunals created by the French *décret-loi* of September 30, 1953. These, numbering 27, are now the administrative courts of first instance, with the right of appeal to the *Conseil d'État* from their decisions, replacing the former *Conseils de Préfecture Interdépartementaux*.

IMRE NEMETHY

[1] Le Conseil d'État, Livre jubilaire, Paris: Recueil Sirey, 1951.

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Mention in this list does not preclude a later review

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Chile

Gonzalez Echenique, J. *Los Estudios Jurídicos y la Abogacía en el Reino de Chile.* Universidad Católica de Chile, Facultad de Ciencias Jurídicas, Políticas y Sociales. Estudios de Historia del Derecho Chileno. No. 2, Santiago: Imprenta Universitaria Valenzuela Basterrica y Cía, 1954. Pp. 369.

Rossel Saavedra, E. *Manual del Derecho de la Familia. (Con las reformas introducidas por la Ley No. 10.271)* Manuales Jurídicos No. 50. Santiago de Chile: Editorial Jurídica de Chile, 1954. Pp. 566.

Ecuador

Código del Trabajo. Leyes anexas, Convenios y recomendaciónes internacionales. Concordado y anotado por Hugo Muñoz Garcia. Ministerio de Prevision Social y Trabajo. Quito: Talleres Gráficos Nacionales, 1954. Pp. 438.

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Besson, M. A. *Le projet de réforme de la procédure pénale.* Paris: Librairie Dalloz, 1956. Pp. 76.

Chrétien, M. *A la recherche du droit international fiscal commun. Étude de droit positif à partir de la jurisprudence des cours internationales.* Préface de M. Batiffol. Paris: Recueil Sirey, 1955. Pp. iii, 246.

Durand, E. *Traité de droit public marocain.* Foreword by H. Terrasse. Institut des Hautes-Études Marocaines, Collection des Centres d'Études Juridiques, XLVI. Paris: Librairie Générale de Droit et de Jurisprudence, 1955. Pp. 391.

Escarra, J.—Escarra, E.—Rault, J. *Traité théorique et pratique de droit commercial. Les Sociétés commerciales.* Tome 3. *Sociétés par actions.* Paris: Recueil Sirey. 1955. Pp. 468.

Gavalda, Ch. *Les conflits dans le temps en droit international privé.* Paris: Librairie du Recueil Sirey, 1955. Pp. xiv, 431.

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Le Bras, G. *Prolégomènes.* Vol. I. *Historie de Droit et des Institutions de l'Eglise en Occident.* Paris: Recueil Sirey, 1955. Pp. x, 271.

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Julliot de la Morandière, L. *Droit civil et institutions judiciaires.* Vol. I. Petits Précis Dalloz. Paris: Librairie Dalloz, 1956. Pp. vii, 573.

PLANIOL, M.—RIPERT, G. *Traité de droit civil français*. 2nd ed. Tome IV: MAURY, J.—VIALLETON, H. *Successions*. Paris: Librairie Générale de Droit et de Jurisprudence, 1956. Pp. 1015.

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RABINOVITCH, L. A. *La réglementation des changes en droit français et en droit international et le statut du Fonds Monétaire International*. Paris: Reprint from Revue de la Banque, Nos. 3–4, 1955. Pp. 317–337.

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Bulletin

Special Editor: KURT H. NADELMANN

American Foreign Law Association

REPORTS

AMERICAN FOREIGN LAW ASSOCIATION—At the thirty-first annual meeting held in New York City on March 26, 1956, Messrs. Martin Domke, Victor C. Folsom, Otto Schoenrich, David S. Stern were elected members of the General Council, Class 1959. The General Council, therefore, consists of Max Rheinstein, Angelo Piero Sereni, Harold Smith, Arthur T. von Mehren (Class 1957); George J. Eder, Phanor J. Eder, David E. Grant, Kurt H. Nadelmann (Class 1958); Martin Domke, Victor C. Folsom, Otto Schoenrich, David S. Stern (Class 1959); and the administrative officers as ex officio members. The General Council re-elected the outgoing officers for another term. President: Otto C. Sommerich; Vice-Presidents: Alexis C. Coudert, John N. Hazard, Hessel E. Yntema; Treasurer: Robert R. Boot; Secretary: Albert M. Herrmann, One Wall Street, New York 5, N. Y.

During the past year, luncheon meetings in New York City were addressed by: Professor Harold J. Berman, of the Harvard Law School, on "Findings on a Visit to U.S.S.R. in the Fall of 1955"; Hon. Carroll G. Walter, Justice of the Supreme Court of the State of New York, on "Various Aspects of Foreign Law"; Professor Wolfgang G. Friedmann, of Columbia University School of Law, on "International Aspects of Anti-Trust Law"; Professor Walter J. Derenberg, of New York University School of Law, on "The Effect of the Universal Copyright Convention on the Protection of Literary and Artistic Property." A joint breakfast meeting at Philadelphia with the Section of International and Comparative Law of the American Bar Association was addressed by Messrs. Jacob M. Lashly and Benjamin Busch, the first speaking on "Contrasting Approaches to the Employment Rights of the United Nations Staff Members," the second on "Current Foreign Law Problems in the Courts." A joint supper session in New York with the Committee on Foreign Law of the Association of the Bar of the City of New York was addressed by Professor Hessel E. Yntema, of the University of Michigan Law School, on "Problems in Conflict of Laws: Choice of Law in Torts and Contracts."

The Association continued its activities as United States representative on the International Association of Legal Science. It was represented by delegates at various international meetings, including the Ninth Conference of the Inter-American Bar Association, Dallas, Texas. It continued its sponsoring membership in the American Association for the Comparative Study of Law, Inc., publisher of the American Journal of Comparative Law.

NINTH CONFERENCE OF THE INTER-AMERICAN BAR ASSOCIATION—The Ninth Conference of the Inter-American Bar Association was held in Dallas, Texas, April 14 to 21, 1956. This outstanding meeting of the lawyers of this Hemisphere was attended by 562 delegates and observers.

The opening session was addressed by President Robert G. Storey, Dr. Eduardo Salazar of Ecuador, Chairman of the Executive Committee, Loyd Wright, former President of the American Bar Association and now Chairman of the House of Deputies of the International Bar Association, R. L. Thornton, Mayor of Dallas, Maurice R. Bullock, President of the State Bar of Texas, Willis M. Tate, President of the Southern Metho-

dist University, Dwight L. Simmons, President of the Dallas Bar Association, Dr. José Barbosa de Almeida, Honorary President of the Inter-American Bar Association. Henry F. Holland, Assistant Secretary of State for Inter-American Affairs, made the principal address at a luncheon on that day on the topic "Ideological Aspects of the Communist Problem."

Addresses were delivered at the afternoon session by the Hon. Stuart Garson, Minister of Justice of Canada, on "Harmonious Coexistence of Civil and Common Law in Canada." His address and that of Hon. Cecil Snyder, Chief Justice of Puerto Rico on "The Commonwealth Legal System of Puerto Rico" were of great interest to comparative law scholars on account of the combination of civil and common law principles which exist in both jurisdictions. The paper presented by Dr. Cesar Camacho, Minister of Justice of Cuba, on "Communism and Subversive Activities" was of special interest on account of his description of the enforcement of Cuban laws relating to communism. Dr. Luis Felipe Urbaneja, Minister of Justice of Venezuela, delivered an address on "Penal Law" and Dr. Osvaldo Illanez Benitez, member of the Supreme Court of Chile, on "The Judiciary and Democracies." In the evening, the delegates were joined by citizens of Dallas in listening to a very significant address by former President Herbert Hoover on "World Experience with the Karl Marx Way of Life."

Honorable Herbert Brownell, Jr., Attorney General of the United States, addressed the delegates at a luncheon the following day. He urged co-operation in the activities of lawyers of North and South America as well as their governments in the suppression of communist efforts to infiltrate into the governmental institutions and other agencies of this Hemisphere. The proceedings of this luncheon were enlivened by the presentation on behalf of the Cuban Government of the Order of Lanuza to Attorney General Brownell by the Minister of Justice of Cuba, Dr. Cesar Camacho, and also to President Storey and Secretary General Vallance.

The 15 committees of the Association considered 68 papers which had been prepared by some of the outstanding legal authorities of the Hemisphere. After full discussion of the merits of proposed resolutions, Committee action was taken regarding them. These proposed resolutions were then considered by the Council of the Association. As a result, 41 resolutions were approved at the final Conference session.

The following resolution on the Bustamante Code is of interest:

"WHEREAS, The Bustamante Code has not been accepted by all of the countries of the Western Hemisphere, and

Whereas, the Secretary General of the Organization of American States, at the request of the Inter-American Juridical Committee has published and distributed (in English and Spanish) a comparative study of the Bustamante Code, the Montevideo Treaties and the Restatement of the Law of Conflict of Laws, which was prepared by the Colombian member of the Inter-American Juridical Committee, and

Whereas, the 1956 Inter-American Academy of Comparative and International Law included a series of lectures on Revision of the Bustamante Code, and

Whereas, the Restatement of the Law of Conflict of Laws is under revision by the American Law Institute,

Therefore be it resolved that:

1. A small group of technical experts be established to study the revision of the Bustamante Code, comparing its provisions with the rules of private international law currently applied in each of the jurisdictions in the Western Hemisphere.

2. The work be undertaken progressively by separate consideration of specific topics of private international law, and recommendations of draft provisions be made with a view to achieving uniformity of rules of private international law in each particular subject.

3. This work be coordinated with the Inter-American Juridical Committee, local law institutes and other institutions con-

cerned with comparative private international law.

4. The Council appoint a special committee to take the necessary steps to implement this resolution."

The subject of extradition and cooperation in the apprehension and trial of criminals was considered by the Ministers of Justice. The paper by Mr. Frederick Diven, Assistant Legal Adviser of the Department of State, pointing out the inadequacy of our present extradition treaties with Latin America and desirability of the negotiation of additional treaties to cover the gaps of the present ones was of particular interest. The following resolution was adopted:

The Ninth Conference of the I.A.B.A.

"Recommends: That matters of extradition should be the subject of bilateral treaties and multilateral conventions, and suggests that the Governments of the American nations adopt basic rules and uniform principles, in order to avoid the possibility that a particular country become a hiding place of common criminals."

The subject of legal education was given careful attention at a meeting of deans of law schools and professors who were especially interested in improvement of the measures for the exchange of students, arrangements for transfer of credits earned from one law school to another, and similar projects.

The Conference sessions on April 20th were devoted to the improvement of the administration of justice in the Americas. They included addresses by Professor Shelden D. Elliott on "Improvements in Judicial Administration" and by Dean Horace E. Read, Dalhousie University Law School, Halifax, N.S., on "Improvements in Judicial Administration and Jurisprudence in Canada." At the luncheon that day, the principal speaker was Dr. Fernando Fournier, Ambassador of Costa Rica to the United States, who spoke on "Advances of Jurisprudence in Latin America." All members of the Supreme Court of Texas attended the meeting on that day and participated in the discussions. Honorable W. St. John Garwood, Associate Justice of the Supreme Court of Texas, presided at the closing banquet which was attended by 1,000 persons.

The Conference closed with the acceptance of the invitation of the Federación Argentina de Colegios de Abogados to hold the Tenth Conference in Argentina probably in November 1957 or early in 1958. The following Argentine lawyers were elected to office: Dr. Adolfo Bioy, President; Dr. Horacio Premoli, Vice President for Argentina; Dr. Mauricio A. Ottolenghi, member of the Council and Executive Committee; Dr. Alberto G. Padilla, Assistant Secretary General.

President Robert G. Storey, who was in charge of arrangements for this highly successful conference, was elected Honorary President. William Roy Vallance was re-elected as Secretary General; Miguel S. Macedo of Mexico City was continued as Treasurer and Charles R. Norberg of Washington, D. C. was elected Assistant Treasurer, in place of David B. Karrick who resigned on account of his new duties as Commissioner of the District of Columbia.

The social program was very enjoyable. It is regretted that space does not permit a résumé of it.

WILLIAM ROY VALLANCE

INTERNATIONAL INVESTMENT LAW CONFERENCE—An International Investment Law Conference, sponsored by the American Society of International Law, was held in Washington, D. C., on February 24 and 25, 1956. The Conference was one of a series of events held this year to mark the 50th anniversary of the American Society of International Law.

Attendance at the Conference was surprisingly large. The participants included not only lawyers and educators, but also many representatives of large American corporations with foreign interests. Over 700 persons registered for the Conference, and about 500 attended each of the four sessions.

The large and varied participation in the Conference is further evidence, if any is needed, of the current revival of interest in foreign operations on the part of the private business community. This interest has manifested itself in recent years in a number of different ways. The value of private American investments abroad is growing at a steady rate. Direct investment in manufacturing enterprises appears to be growing in importance in relation to the perennial leaders, petroleum and mining; and portfolio investment, which has been almost nonexistent, is showing signs of life. The United States securities market is becoming more receptive to foreign issues and has recently opened up to a few issues of foreign non-Canadian securities. There has been a great deal of activity in the organization and registration of investment companies to carry on foreign operations. This resurging interest has not yet been matched by a corresponding spurt in the rate of outflow of private capital. But whether as a consequence of increased activity abroad or as a consequence of a growing awareness of the significance of international investment in the world economic picture, lawyers and businessmen engaged in foreign business appear to be eager to study and discuss their common legal problems.

The potential investor has heard time and again of the legal problems which are peculiar to foreign investments: he knows, for example, that he must consider the existence of restrictions imposed by capital-importing countries on repatriation of capital and earnings. He knows he must weigh the risk of currency devaluation, of governmental instability and of expropriation and discriminatory treatment. Rightly or wrongly, he tends to be suspicious of most foreign courts, doubting that they would afford him the equal protection of the laws which he feels he gets in his own courts. He realizes that his unfamiliarity with local laws and local practices constitutes by itself a significant risk, in some cases possibly the most significant risk of all. And in addition to these dangers which loom from beyond his national borders, he recognizes that he must pay careful attention to domestic legal problems which are peculiar to investment abroad, such as those in the fields of antitrust law and taxation.

It is easy to see then why the lawyer is so intimately concerned with the future of foreign investment and why the Conference attracted so many lawyers and businessmen. For it was obvious that they came not only to discuss matters of academic interest, but also to get assistance in answering their own practical problems, actual and potential. Many of the problems, difficult enough in themselves, are made doubly difficult by the fact that there are few reliable sources where the investor and his lawyer can go to acquaint himself with the laws of the importing country relating to a prospective investment. It is hoped that one result of the Conference will be to foster the compilation and publication of accurate, detailed, current information on laws which are of special interest to the foreign investor. The International Tax Study project now under way at Harvard is an example of what is needed. Similar projects in the field of entry and management, corporation law, and securities law would be fruitful applications of the time of other law schools, possibly in collaboration with the United Nations and with the financial help of the foundations.

The Conference itself was divided into four sessions, each devoted to one general topic. In dealing with controversial topics an attempt was made to have different points of view represented. The general topics were: "American Business Abroad—Problems of Entry and Management; Settlement of Investment Disputes"; "Current Issues Regarding Taxation of Private Investment Abroad"; "The Application of Anti-Trust Laws to Foreign Investment—Obstruction or Stimulus?"; "Legal Incentives to Investment Abroad: Foreign and Domestic Statutes and Policies."

DAVIDSON SOMMERS

INTERNATIONAL ASSOCIATION OF LEGAL SCIENCE—The International Association of Legal Science at the request of UNESCO held a conference for discussion of a program of legal research designed to contribute toward the alleviation of international tension. Representatives of eight national committees of the Association and of six Academies of Science in the Soviet bloc countries were invited to meet at UNESCO House in Paris in February, 1956. India and Uruguay were unable to accept the invitation, but scholars gathered from France, Sweden, Turkey, United Kingdom, United States, Yugoslavia, U.S.S.R., Poland, Czechoslovakia, Rumania, Bulgaria, and Hungary.

Proposals had been submitted in advance of the meeting by the national committees belonging to the International Association and by the Soviet bloc countries. From these suggestions seven were selected to be submitted to UNESCO as likely topics for research. The topics recommended were: (1) sovereignty and international co-operation, (2) legal aspects of commercial relations between countries of different economic structure, (3) legal problems in international law arising from nationalization, (4) the concept of legality and the role of law in socialist and nonsocialist countries, (5) the legal status of spouses and children in family law and the law of inheritance, (6) judicial assistance including the execution of foreign judgments, and (7) the development of municipal services (a study in comparative public administration).

The final selection of topics for interdisciplinary research will rest with UNESCO, which has convened an interdisciplinary meeting to be held in Vienna in July.

JOHN N. HAZARD

THIRD MEETING OF THE INTER-AMERICAN COUNCIL OF JURISTS—The third meeting of the Inter-American Council of Jurists was held in Mexico City from January 17 to February 4, 1956. The System of Territorial Waters, Reservations to Multilateral Treaties, a Draft Uniform Law on International Commercial Arbitration, a Draft Convention on Extradition, and International Co-operation in Judicial Procedures were among the subjects given consideration. The nine members of the Inter-American Juridical Committee were elected: Ambrosio Alvarez Aybar (Dominican Republic), José Joaquin Caicedo Castilla (Colombia), Francisco Clementine de San Tiago Dantas (Brazil), Luis David Cruz Ocampo (Chile), Isidoro Ruiz Moreno (Argentina), Victor Manuel Pérez Perozo (Venezuela), George H. Owen (United States), Francisco A. Ursua (Mexico), Mariano Ibérico (Peru). The fourth meeting of the Council will be held in Chile.

AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION—The 35th annual meeting of the American Branch of the International Law Association was held in New York City on May 11 and 12, 1956, under the chairmanship of Professor Clyde Eagleton, president of the Branch. The guest speaker at the annual dinner was W. Harvey Moore, Q.C., Honorary Secretary General of the International Law Association. International Law Aspects of Monetary Questions were discussed by two round tables, one chaired by Phanor J. Eder, with Joseph Dach and Charles Evan as panel members, dealing with a draft convention on Payment of Foreign Money Liabilities; the other chaired by Martin Domke, with Richard N. Gardner and Nicholas Doman as panel members, dealing with Article VIII 2 (b) of the Bretton Woods Agreement. James E. S. Fawcett, General Counsel of the International Monetary Fund, made the opening speech. At the business session, committee reports prepared for the Dubrovnik conference of the Association were discussed and approved.

INTER-AMERICAN ACADEMY OF INTERNATIONAL AND COMPARATIVE LAW—The eighth annual session of the Inter-American Academy of International and Com-

parative Law took place in Havana from February 27 to March 10, 1956. Six courses were offered: "Problems of International Law Involved in the Interpretation and Amendment of the Charter of the United Nations," by Professor Quincy Wright, of the University of Chicago; "The Crossroads of Justice," by Professor Hessel E. Yntema, of the University of Michigan Law School; "Revision of the Bustamante Code," by William S. Barnes, Assistant Dean, Harvard Law School; "As sociedades de economia mista nos seus aspectos contemporaneos," by Professor Waldemar M. Ferreira, of the University of São Paulo; "Principios básicos del Derecho Electoral Contemporaneo," by Professor Antonio Lancis, of the University of Havana; "Cooperación procesal internacional: bases para su unificación," by Professor Niceto Alcala-Zamora, of the University of Mexico School of Law. More than sixty students were in attendance. Mr. George A. Finch, President of the Academy, presided over the session. On the closing day, Professor David Stern, of the University of Miami School of Law, arranged a regional meeting of the American Society of International Law, in which the status of international treaties in national courts was debated.

FOURTH INTERNATIONAL CONGRESS OF SOCIAL DEFENSE—The Fourth International Congress of Social Defense was convened at Milan, Italy, April 2–6, 1956, to deal with prevention of offenses against life and person. It was attended by over 600 delegates from 32 noncommunist countries and Yugoslavia. The physical arrangements at Milan's splendid Hall of Science, the foresight and efficiency with which the thousand and one mechanical problems of such an enterprise were met, and the generosity of the entertainment provided for visitors reflected highest credit upon the Italian hosts of the Congress.

"Social Defense" is the banner under which leading European criminalists are attacking traditional penal law, deductive, inflexible, and chiefly concerned with the criminal act and exemplary punishment. The movement (see, notably, Marc Ancel, "La Défense sociale nouvelle") seeks to focus attention on the personality of the offender, on rehabilitation rather than penalty, and on prevention of criminality through all sorts of non-retributive measures including education, regulation of dangerous activities, early diagnosis and therapy of antisociality, and incapacitation or retraining of dangerous characters such as alcoholics, recidivists, and "vagrants." To a considerable extent the movement represents a demand for measures already well established in the United States, such as indeterminate sentences, probation, supervised parole, and special procedures for children and young offenders.

Well in advance of the Congress, eminent jurists and criminologists had prepared scores of papers on particular problems. These submissions were analyzed by teams of general reporters: Stephan Hurwitz and Pietro Nuvolone on legal aspects; Thorsten Sellin and René König on sociological aspects; Georges Heuyer and Agostino Gemelli on bio-psychological aspects. To facilitate consideration of this material by the Congress there were "Rapports de Synthèse" by Giacomo Delitala (unintentional offenses) and Paul Cornil (intentional offenses).

The general reports on sociological, biopsychological, and legal aspects were each discussed in a corresponding separate section, resulting in some tendency to segregate disciplines that ought to be united in considering particular problems. However, the "rapports de synthèse" and the final resolutions were debated in plenary sessions. Here it became apparent that the original intention of the organizers to deal with specifics rather than generalities had not entirely succeeded. The preoccupations of individual delegates with such questions as uniform international traffic regulation, sexual

offenses, or the menace of alcoholism often took them quite outside the realm of offenses against bodily safety. Ultimately, the sense of the Congress had to be embodied in resolutions which were quite general, and also surprisingly conservative as compared with the predominant tone of the oratory, which at times seemed to demand reorientation of the penal law so as to treat offenders and "dangerous persons" in accordance with their personalities, and substantially without regard to the gravity of the offense, if any, committed by the individual.

The resolutions adopted call for scientific research into the real causes of crime; emphasis on prevention rather than punishment; continued scrupulous regard for human dignity and individual rights; adhesion to the principle of legality, i.e., immunity from punishment for behavior not previously proscribed as criminal; special study of the problem of unintentional offenses, notably in automotive traffic; special preventive measures in relation to behavior and situations involving a probability of harm; establishment of uniform statistics; inquiry into the reality and efficacy of deterrence by exemplary punishment; and broader use of the findings of bio-psychology, psychiatry, sociology, and other sciences, in view of the "apparent" insufficiency of traditional methods of repressing crime.

LOUIS B. SCHWARTZ

VARIA

REVISION OF THE CIVIL CODE OF QUEBEC —On January 1955, the Provincial Parliament of Quebec passed a Law concerning the Revision of the Civil Code, in force in that Province since the 1st of August 1866. This Law provided for the appointment of a Commission to revise the Code, with instructions to follow the legislative method adopted for the initial drafting of the Code, and to maintain its distinctive characteristics, to make the appropriate corrections in language and setting; but also to recommend the substantial modifications which may appear advisable.

Accordingly, on the 1st of May 1955, the Quebec Government appointed the Right Honorable Thibaudeau Rinfret, former Chief Justice of Canada, together with Mr. Louis-Philippe Gagnon, Q.C., Advocate of Montreal, to report to the Attorney General on the projected revision.

These gentlemen, together with Miss Suzanne Beaulieu, acting as secretary, are now busy on their appointed Commission. They have asked the judges, the lawyers, and the public at large, to send suggestions; and the interest in the Province is evident by the fact that they have already received a great number of letters and resolutions favoring amendments to the Civil Code.

THIBAUDEAU RINFRET

LAW REVISION IN INDIA—In August 1955, the Government of India announced appointment of a Law Commission, with headquarters in New Delhi, consisting of eleven members and chaired by the Attorney General of India, for the purpose of (1) reviewing the system of judicial administration in all its aspects and suggesting ways and means of improving it and making it speedy and less expensive, (2) examining the Central Acts of general application and importance, and recommending lines on which they should be amended, revised, consolidated, or otherwise brought up to date.

In pursuance of the task assigned it under the first term of reference, the Law Commission has addressed to the members of the legal profession a questionnaire, "Reform of Judicial Administration." This questionnaire, composed of not less than 193 questions, opens with

the inquiry: "Do you consider the present system of administration of justice based on the British model suited to our needs having regard to (a) our poverty, and (b) the mass of our population being in the villages?" It goes into such areas as: recruitment of the judiciary, law reporting, legal education, legal aid, jurisdiction and procedure, execution, evidence, administrative procedure, criminal law, and criminal procedure.

Replies to the questionnaire are due by the 15th of April 1956. The Commission is to report by the end of 1956.

K. H. N.

Current Literature on Foreign and Comparative Law

Special Editor: CHARLES SZLADITS

Parker School of Foreign and Comparative Law
Columbia University

LIST OF RECENT BOOKS AND ARTICLES IN ENGLISH ON FOREIGN AND COMPARATIVE LAW*

I. ON COMPARATIVE LAW AND RELATED SUBJECTS IN GENERAL

1. COMPARATIVE LAW IN GENERAL

Books:

Hamson, C. J.: The law: its study and comparison. Cambridge, 1955. 29 p. An inaugural lecture dealing with the study of law in Cambridge and the usefulness of the comparative method.

Lawson, F. H.: A common lawyer looks at the civil law. Ann Arbor, 1955. 238 p. Five lectures on the nature and character of civil law, its sources, the contribution made by Roman law to modern civil law, its advance beyond Roman law, and the non-Roman elements to be found in it.

Michigan. University. Law School: Comparative law (cases and materials) Ann Arbor, 1938–40.

Articles:

Brutau, J. P.: Realism in comparative law. Am. J. Comp. L. **3:** 42–59, '54.

Emmering, E: Comparative law: The Netherlands. Clev. B. A. J. **25:** 171, 183–84, '54.

Miller, I. L.: Comparative law: England, Clev. B. A. J. **25:** 203, 215–16, '54.

Schwenk, E. H.: Highlights of a comparative study of the common and civil law systems. North. Car. L. Rev. **33:** 382–89, '55.

2. ACADEMIES, CONGRESSES AND INSTITUTES

Books:

Pan American Union. Dept. of Int'l Law. Handbook, second meeting of the Inter-American Council of Jurists, Buenos Aires. Washington, 1953, 98 pp.

Articles:

Barcelona Institute of Comparative Law. Int'l & Comp. L. Q. **3:** 351–52, '54.

Cheshire, G. C. See: Wortley, B. A.

Farran, C. d'O: Silver Jubilee of The Hague Academy. Int'l & Comp. L. Q. **3:** 677–79, '54.

Rheinstein, Max: Twenty-fifth anniversary of the Italian Institute of

* This list contains books up to and including 1955 and articles published between April 1, 1953, and December 31, 1954, forming an interim supplement to *A Bibliography on Foreign and Comparative Law*, compiled and annotated by Charles Szladits, Parker School of Foreign and Comparative Law, Columbia University. Distributed by Oceana Publications, New York, 1955. Pp. xx, 508.

Legislative Studies. Am. J. Comp. L. **3:** 397–99,'54.

Wortley, B. A.: Aspects of the 1951 Hague conference on private international law. (In: Festschrift Hans Lewald, Basel, 1953, pp. 407–17.)

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3. BIBLIOGRAPHIES

Books:

Andaya, Araceli: An annotated bibliography of Philippine public administration. Manila, 1953. 53 p.

Ceylon. Bibliography on land tenure and related problems in Ceylon. Ceylon, 1952. 83 p.

India. Parliament, Bibliography. No. 1–26. New Delhi, 1950–54.

Keesing, F. M.: Culture change, an analysis and bibliography of anthropological sources to 1952. Stanford, 1953. 242 p.

Louisiana. Dept. of State. Official publications. Baton Rouge, 1954. 2 v.

Pacis-Nebrida, Leticia and Tendero, A. P.: Annotated Philippine legal bibliography. Manila, 1954. 37 p.

Pan American Union. Division of Legal Affairs. Selected bibliography of legal and related matters affecting business in Argentina. Washington, 1951.

Schwerin, Kurt: Guide to the legal collections in Chicago. Chicago, 1955. 1 v. loose-leaf.

Sworakowski, W. S.: Hoover Library collection on Russia. Stanford, 1954. 42 p.

Szladits, Charles: A bibliography on foreign and comparative law, books and articles. New York, 1955. 506 p.

Sztachova, Jirina comp.: Mid-Europe: a selective bibliography. New York, 1953. 197 p. (Mid-European Studies center of the Nat. Comm. for a Free Europe).

Taylor, C. R. H.: A Pacific bibliography. Wellington, 1951. 492 p.

United Nations. Food and Agriculture Organization. Bibliography on land tenure. 1955. 386 p.

U. S. Library of Congress. Reference Dept. Research and information on Africa: continuing sources. Washington, 1954. 70 p.

U. S. Copyright Office. Bibliography on design protection, comp. and ed. by B. A. Ringer. Washington, 1955. 70 p.

Wallach, Kate: Bibliographical history of Louisiana civil law sources Roman, French and Spanish, with an added section on modern French research materials. Baton Rouge, 1955. 80 p.

Articles:

Hamson, C. J.: Publications of Professor H.C. Gutteridge. Int. and Comp. L. Q. **3:** 386–92, '54.

Szladits, Charles: Note on translations of foreign civil and commercial codes. Am. J. Comp. L. **3:** 67–72, '54.

Yntema, H. E.: Recent literature on jurisprudence. Am. J. Comp. L. **3:** 257–59, '54.

4. COMPARATIVE LAW AND LEGAL EDUCATION

Books:

Eisenmann, Charles: The University teaching of social sciences. Law. Paris, 1954. 133 p. A report on a survey of the teaching of law in ten countries: Belgium, Egypt, France, India, Lebanon, Mexico, Sweden, the United States and Yugoslavia. It deals with the aims, nature and method of the teaching of law, and the organization of law teaching in the respective countries.

Lawson, F. H.: The teaching of Roman law in the United Kingdom. (In: L'Europa e il diritto romano, Milano, 1954, vol II. p. 271–300).

Articles:

Brewster, K. Jr: Harvard law in Salzburg. Harv. L.S. Bull. **4:** 9, 19, '53.

Chitale, S. G.: American legal education through Indian eyes. Un. Flo. L. Rev. **6:** 207–17, '53.

Franklin, Mitchell: On the problem of

teaching Roman law. J. Leg. Educ. **5:** 508–13, '53.

Friedmann, Wolfgang: Teaching and research in comparative law—recent developments at the University of Toronto School of Law. U. Toronto L. J. **10:** 245–47, '54.

Hahlo, H. R.: Legal education in America. S. A. L. J. **71:** 232–253, '54.

McGechan, Robert: A New Zealander comments on American Legal education. J. Leg. Educ. **5:** 286–301, '53.

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Rand, Hon. I. C.: Legal education in Canada. Can. Bar Rev. **32:** 387–418, '54.

Schlesinger, R. B.: Teaching comparative law: the reaction of the customer. Am. J. Comp. L. **3:** 492–501, '54.

Sinco, V. G.: Objectives of the new curriculum of the college of Law. Phil. L. J. **29:** 307–311, '54.

von Mehren, Arthur: The legal session of the Salzburg seminar. Harv. L. Rev. **67:** 829–34, '54.

5. CODIFICATION OF LAW

6. UNIFICATION OF LAW

Books:

Pan American Union. Report on the activities of the organization of American States. Washington, 1953. 211 p.

Schwartz-Liebermann von Wahlendorf, H. A.: Some aspects of the influence of procedure and composition on the material achievements of international and supranational European organizations. Bonn, 1954. 47 p.

Valentine, D. G.: The Court of Justice of the European Coal and Steel community. The Hague, 1955. 273 p.

Articles:

Abel, Paul: Brussels copyright convention and its influence on domestic copyright legislation (in particular in the United Kingdom and in Austria). Int. & Comp. L. Q. **3:** 330–41, '54.

Contini, Paolo: The United Nations draft conventions on maintenance claims Am. J. Comp. L. **3:** 543–51, '54.

Durand, P. M. F.: The M. G. S., International convention for rail transport in Eastern Europe. J. du Droit Int'l. **81:** 690–735, '54.

Feltz, F. baron van der: Uniform law relating to the limitation of shipowners. Nedrl. Tijdsch. v. Int. R. **1:** 385–94, '54.

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Sell, L. Z.: English-Spanish comprehensive specialist's dictionary for insurance, finance, law, labor, politics, business. New York, 1955. 536 p.

II. GENERAL PART

1. GENERAL SURVEYS OF LAWS, INTRODUCTORY WORKS

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development of jurisprudence (J. Schacht), the schools of law (J. Schacht), nature and sources of the Shari'a (S. G. Vesey-Fitzgerald), Shi'ī legal theories (A. A. A. Fyzee), family law (M. Abu Zahra), property and obligations (Subhi Mahmasani), the law of Waqf (H. Cattan), penal law (R. Maydani), judicial organization (E. Tyan), development of Shari'a law under the Ottoman Empire (E. Mardin), development of Western judicial privileges (H. J. Liebesny), conflict of law (C. Cardahi) and international law (M. Khadduri). It also contains a useful glossary of legal terms and a select bibliography.

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